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IN THE

# SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

*Petitioner,*

vs.

EDWARD HAROLD SCHAD,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## CAPITAL CASE

## QUESTIONS PRESENTED

The majority panel Ninth Circuit opinion vacated the district court's finding that Schad was not diligent in developing a state court record for his claim of ineffective assistance of counsel (IAC) at sentencing, and remanded for an evidentiary hearing on diligence, as well as sanctioning a simultaneous hearing on the merits. Judge Rymer dissented from the panel opinion, and eight judges dissented from the order denying rehearing, because: (1) Schad did not present the state court with any affidavits with specific facts to support his claim, as required by Arizona law and *Williams v. Taylor*, 529 U.S. 420 (2000); (2) Schad had not asked the district court for a hearing on diligence; (3) the existing record was more than sufficient to determine the question of diligence; and (4) if the existing record was insufficient, an evidentiary hearing was prohibited because Schad bore the burden in district court of showing diligence in state court. The dissenters also pointed out that the panel majority opinion conflicts with *Schriro v. Landrigan*, 550 U.S. 465 (2007), by considering whether the district court abused its discretion by denying an evidentiary hearing, when it alternatively addressed the new material Schad presented and concluded it showed neither deficient performance nor prejudice.

1. Does the majority panel opinion conflict with *Williams* and AEDPA, by awarding Schad an evidentiary hearing on diligence and a simultaneous hearing on the merits, despite his lack of diligence?

2. Diligence aside, does the Ninth Circuit's opinion conflict with *Landrigan*, other circuit court opinions, and AEDPA, by remanding for an evidentiary hearing without analyzing—under *Strickland v. Washington*, 466 U.S. 668 (1984), and the deferential AEDPA standards—whether Schad presented a colorable IAC claim, or considering the claim on the merits, when the district court considered the claim in light of the new evidence Schad presented, discussed that evidence at some length, and concluded it showed neither deficient performance nor prejudice?

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## OPINIONS BELOW

The Ninth Circuit's opinion (App. A), amending and superseding the previous amended panel opinion, and preceded by an opinion dissenting from the court's order denying rehearing *en banc*, is reported at *Schad v. Ryan*, 606 F.3d 1022 (9th Cir. 2010). The first and second superseded panel opinions are reported at *Schad v. Ryan*, 581 F.3d 1019 (9th Cir. 2009), and *Schad v. Ryan*, 595 F.3d 907 (9th Cir. 2010.) On June 10, 2010, the Ninth Circuit filed an unpublished order granting a motion to stay its mandate pending disposition of this petition.

The district court's decision and order denying Schad habeas relief (App. B) is reported at *Schad v. Schriro*, 454 F.Supp.2d 897 (D. Ariz. 2006). The district court's order denying Schad's motion to alter or amend the judgment (App. C) is reported at *Schad v. Schriro*, 2007 WL 215618 (D. Ariz. 2007) (unpublished).

The Arizona state trial court summarily denied post-conviction relief in an unreported minute entry. (App. D.) The Arizona Supreme Court's summary order denying review of the state trial court's order is also unpublished (App. E.)

The Arizona Supreme Court's opinion affirming Schad's conviction and death sentence on direct appeal is reported at *State v. Schad*, 788 P.2d 1162 (Ariz. 1989). This Court's opinion, affirming on certiorari review, is reported at *Schad v. Arizona*, 501 U.S. 624 (1991).

## STATEMENT OF JURISDICTION

A divided panel of the Ninth Circuit granted Schad partial habeas relief in a *per curiam* opinion issued on September 11, 2009. On June 3, 2010, the Ninth Circuit issued a published order/opinion reporting the denial of the petition for rehearing *en banc*, an opinion dissenting from the denial of rehearing, and an amended panel opinion. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254(e)(2) provides, in relevant part:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing . . .

## STATEMENT OF THE CASE

### 1. *Facts of the crime.*

A summary of the facts regarding the murder for which Schad was convicted is set forth in the Ninth Circuit's final amended majority panel opinion. (App. A). *See also Schad v. Ryan*, 606 F.3d 1022, 1032-1034. (9th Cir. 2010). The Ninth Circuit prefaced its discussion of the facts of the murder by saying: "This is a case with strong circumstantial evidence pointing to the defendant's guilt and to no one else's." (App. A-17.)

The victim, Lorimer Grove, a 74-year-old resident of Bisbee, Arizona, was last seen on August 1, 1978, when he left Bisbee driving his new Cadillac, coupled to a trailer, to visit his sister in Everett, Washington. Grove may have been carrying up to $30,000 in cash. (*Id.*)

On August 9, 1978, Grove's body was discovered in thick underbrush down a steep embankment off the shoulder of U.S. Highway 89, several miles south of Prescott, Arizona. The medical examiner determined that the cause of death was ligature strangulation accomplished by means of a sash-like cord, still knotted around the victim's neck. According to the medical examiner, Grove had been strangled using a significant amount of force, resulting in breaking of the hyoid bone in his neck and the reduction of his neck circumference by approximately four inches. The time of death was estimated to be four to seven days prior to discovery of the body. (*Id.* at A-18.)

No physical evidence at the crime scene implicated Schad in Grove's murder, and there was no evidence of a prior connection between the two men. There was, however, ample evidence establishing Schad's presence in Arizona at the time of the crime and his possession, after the date Grove was last seen, of Grove's property, including his Cadillac, credit cards and jewelry. (*Id.*)

On August 3, 1978, two days after Grove left Bisbee, and six days before his body was discovered, an Arizona highway patrolman found an abandoned Ford Fairmont sedan alongside Highway 89, approximately 135 miles north of where Grove's body was discovered. The Ford was unlocked, except for the trunk, and its license plates were missing. A check of the Fairmont's VIN revealed that Schad had rented the car from a Ford dealership in Utah in December 1977, had failed to return it, and that the dealership had reported it as stolen. (*Id.*).

According to Schad's girlfriend, Wilma Ehrhardt, she and Schad, along with Ehrhardt's children, had driven the car from Utah to New York, Florida, and Ohio between December 1977 and July 1978. In late July, Schad told Ehrhardt he was going to look for work and left Ohio with the Ford. Ehrhardt and the children remained in Ohio, but later returned to Utah. (*Id.* at A-19.)

When police impounded the Ford on August 3, 1978, they found in it, among other things, three Arizona newspapers dated July 31 and August 1, 1978, the days just before the estimated date of Grove's

murder, as well as a special mirror device later identified by witnesses as an object Grove invented to help him couple his trailer to his Cadillac. (*Id.*)

According to credit card records, on August 2, 1978, Schad began driving the Cadillac from Arizona eastward, using Grove's credit cards to make purchases in numerous cities along the way. On August 2, Schad used Grove's credit card to purchase gasoline in Benson, Arizona. On August 3, Schad used the card to purchase gas in Albuquerque, New Mexico. For approximately the next month, Schad continued traveling the country in the Cadillac and using Grove's credit card. Schad also used Grove's checkbook to forge a check to himself from Grove's account, which he cashed on August 7, 1978, in Des Moines, Iowa. (*Id.*)

In New York state on September 3, 1978, Schad, still driving Grove's Cadillac, was stopped for speeding by a New York state highway trooper. Schad told the trooper he was delivering the car to New York on behalf of a "rather elderly" man named Larry Grove. Schad could not produce the car's registration, and instead gave the trooper the registration for Grove's trailer. The trooper issued Schad a citation and let him go. (*Id.* at A-19 to A-20.)

Schad then drove back across the country, reuniting with Ehrhardt in Salt Lake City, Utah, on September 7, 1978. A man who was living with Ehrhardt at the time, John Duncan, contacted Salt Lake City police the same day to report that Schad had told him the Cadillac was stolen. Schad was arrested in Salt Lake City on September 8. (*Id.*)

After Schad's arrest, Salt Lake City police impounded and searched the Cadillac. From the Cadillac's title application, found in the car, the police learned that the vehicle belonged to Grove. Schad told police that he had obtained the Cadillac four weeks before in Norfolk, Virginia, after meeting "an elderly gentleman who was with a young girl" and who asked Schad to trade vehicles temporarily so that he and the girl would not be recognized. Schad also told the Utah police that he "was supposed to leave [the Cadillac] at the New York City port of entry at a later date for the man to pick up." Police found in the Cadillac's trunk a set of Utah license plates issued to Ehrhardt. Schad had previously installed these plates on the stolen Ford. He left the Cadillac's original plates on the car while he was driving it across the country. (*Id.* at A-20.)

After Schad's arrest, Ehrhardt went to the Salt Lake City jail and retrieved Schad's wallet. Duncan then searched the wallet and found the credit card receipts and the New York traffic citation. He again contacted the Salt Lake City police. When Detective Halterman came to Ehrhardt's home to collect the wallet and the documents, Ehrhardt also handed over a diamond ring she said her daughter had found in the glove compartment of the Cadillac. Witnesses later identified the ring as belonging to Grove. Duncan also visited Schad in jail. Duncan testified that during the visit Schad talked about lying about his presence in Arizona at the time of the crime and destroying evidence of the crime. (*Id.* at A-20 to A-21.)

2. *Procedural history of the case.*

a. State court proceedings.

On October 5, 1979, the jury found Schad guilty of first-degree murder and the trial court sentenced him to death. (*Id.* at A-21.) Schad's conviction and sentence were affirmed on his first direct appeal, but he obtained state post-conviction relief on his murder conviction. (*Id.*) *See State v. Schad*, 691 P.2d 710 (Ariz. 1984).

Schad was re-tried in 1985, and again convicted of first-degree murder and sentenced to death. (App. A-21.) The Arizona Supreme Court again affirmed on direct appeal. *Id. See State v. Schad*, 788 P.2d 1162 (Ariz. 1984). This Court granted certiorari review on two issues, and affirmed Schad's conviction and sentence. *See Schad v. Arizona*, 501 U.S. 624 (1991).

Schad initiated another round of state post-conviction proceedings, and after 4 years of seeking and obtaining repeated extensions to file his supplemental petition, the state trial court denied the petition. (App. D.) The Arizona Supreme Court summarily denied review. (App. E.)

b. Federal district court.

Schad filed his federal habeas petition in 1998, raising nearly 30 claims. (App. A-22.) On September 28, 2006, the district court denied habeas relief. (App. B.) *See also Schad v. Schriro*, 454 F.Supp.2d 897 (D. Ariz. 2006). The district court also denied Schad's motion for an evidentiary hearing to develop new mitigating evidence to support his claim of ineffective

assistance at the penalty phase, finding Schad had not been diligent in developing such evidence during his state post-conviction proceedings. (App. B-125 to B-127.) It also alternatively concluded that the new evidence Schad submitted to the district court did not render counsel's performance deficient because it would not have supported the defense strategy at sentencing of presenting the same positive image of Schad that counsel had pursued at trial. (*Id.* at B-80 to B-100.) The district court concluded that Schad had shown neither deficient performance nor prejudice. (*Id.* at B-97.) It ruled that the state trial court's denial of the IAC-sentencing claim was not an unreasonable application of clearly established federal law as set forth in *Strickland*. (*Id.* at B-100.)

c. Ninth Circuit.

The Ninth Circuit panel opinion unanimously upheld Schad's conviction, but in a 2-1 *per curiam* panel opinion expressing the views of Judges Reinhardt and Schroeder, remanded to the district court for further proceedings on the IAC-sentencing claim. (App. A-15.)

The majority opinion vacated the district court's finding that Schad had not been diligent, finding that the district court applied the wrong standard in analyzing Schad's diligence: "The district court, however, focused not on the reasonableness of Schad's efforts in state court to develop mitigating evidence regarding his childhood, but on the fact he did not succeed in doing so." (*Id.* at A-43.) In its analysis of the diligence issue, the majority took a "sneak peek" at the new evidence presented to the district court, and

concluded that, if it had been presented to the sentencing court, "would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating circumstances present in the case." (*Id.* at A-44.)

The majority concluded that: "Neither the state court nor the district court record, however, contains information sufficient for us to determine whether or not those efforts [by state post-conviction counsel] were reasonable and that Schad therefore acted diligently." (*Id.*, at A-45.) The majority opinion, in passing, recognized that the district court, "had stated it had considered the new evidence proffered by Schad in support of his ineffective assistance of sentencing counsel claim and said that, even assuming diligence, this new evidence could not justify relief." (*Id.*) Without any analysis whatever of what the district court had found and concluded, the majority opinion simply stated: "We disagree with that ruling." (*Id.*)

The majority remanded "for further proceedings to determine whether Schad was diligent in attempting to develop the state court record." (*Id.*) It admonished the district court to "apply the proper standard as to the reasonableness of his efforts." (*Id.*) It ordered that, if the district court found "that Schad's efforts to develop the record in state court were reasonable, the district court should hold an evidentiary hearing on the merits of the ineffective assistance of sentencing counsel claim, because the evidence Schad presented to the district court was stronger than the evidence presented at sentencing." (*Id.* at A-46.) Alternatively, if the district court concluded an evidentiary hearing

on diligence is appropriate, it "could hold a single evidentiary hearing at which it receives evidence concerning both diligence and the merits." (*Id.*) The Ninth Circuit further advised the district court that, if it reached the merits of the IAC claim, it was to consider two recent opinions from this Court. (*Id.*)

Judge Rymer filed a lengthy opinion dissenting from the part of the majority opinion ordering a remand. (App. A-55 to A-77.) She believed that the district court had "faithfully construed AEDPA's diligence requirement, . . . " (App at A-55.) Judge Rymer argued that the majority had misapplied *Williams* because the record showed that post-conviction counsel knew of possible evidence that Schad's childhood was abusive, but failed to present such evidence to the state court after nearly four years of state post-conviction proceedings." (*Id.* at A-55 to A-56.) Judge Rymer also disagreed with the majority's remand for an evidentiary hearing on diligence when Schad had not requested one, "simply because the record seems to indicate to two of us to contain information that is inadequate to determine whether Schad's efforts were reasonable," when it was Schad's burden to show diligence. (*Id.* at A-57.)

The dissent also took the majority to task for remanding "without taking into account the district court's alternative explanation why no hearing is required, without mentioning AEDPA, and without tethering the order to *Strickland*." (*Id.*) It faulted the majority for disregarding the "district court's extensive and reasoned holding in the alternative that, even considering the newly developed information, Schad

was nevertheless not entitled to an evidentiary hearing on his ineffectiveness claim." (*Id.* at A-75.) It noted the Ninth Circuit's dismissal of the alternative ruling did not reference AEDPA, *Strickland*, or other authority from this Court regarding evidentiary hearings in federal court on IAC claims. (*Id.* at A-75 to A-76.)

Respondents filed a petition for rehearing en banc, which was denied on June 3, 2010. (App. at A-1 to A-2.) However, eight judges dissented from the denial of rehearing, and their views are expressed in the dissenting opinion authored by Judge Callahan (hereafter "Callahan dissent"). (*Id.* at A-3 to A-15.)

This dissenting opinion was written to protest: "the gravity of the majority's departure from settled Supreme Court law, and [to] emphasize how it effectively eviscerates AEDPA's diligence requirement as well as the preliminary showing the Supreme Court has held a state prisoner must make in order to obtain an evidentiary hearing in federal court." (*Id.* at A-3.) Judge Callahan agreed with Judge Rymer's dissent that the "majority decision to remand for 'further proceedings' and an evidentiary hearing on 'diligence' and the merits of Schad's ineffective assistance of counsel claim conflicts with AEDPA's diligence requirement, 28 U.S.C. § 2254(e)(2), and the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 420 (2000)." (*Id.* at A-3.)

Judge Callahan's dissent made three major points. First: "The majority opinion substantially erodes AEDPA's requirement that a person challenging the constitutionality of his state conviction diligently

pursue his claim in state court in order to obtain an evidentiary hearing in federal court. 28 U.S.C. § 2254(e)(2)." (*Id.* at A-3.) Second, "it effectively eviscerates the diligence requirement altogether by endorsing a simultaneous hearing on both the petitioner's 'diligence' and the merits of his claim of ineffective assistance of counsel (IAC)." (*Id.* at A-4.) Third, it found "the majority's decision effectively eliminates the requirement that a petitioner present a colorable claim for federal habeas relief before a federal court may grant an evidentiary hearing." (*Id.*) The dissenters would have granted rehearing *en banc* to "rectify these departures from Supreme Court precedent and to correct what district courts in our circuit are likely to perceive as a confusing directive to hold evidentiary hearings where Congress and the Supreme Court have determined that none are permitted." (*Id.*)

After listing the defects of the majority opinion, Judge Callahan concluded:

> In sum, the majority's seemingly innocuous decision to remand for "further proceedings," including a possible evidentiary hearing concerning both the issue of Schad's diligence and the merits of his IAC claim is, in reality, a substantial revision of § 2254(e)(2) and governing Supreme Court authority.
>
> It effectively eviscerates AEDPA's diligence requirement by (1) eliminating the threshold showing of diligence

> required to obtain an evidentiary hearing, (2) permitting an evidentiary hearing on the issue of diligence itself, and (3) endorsing simultaneous hearings on both the issue of "diligence" and the merits of a petitioner's underlying claim.
>
> By endorsing evidentiary hearings on the issue of "diligence," even when the record clearly shows that the evidence was readily available in state court, the majority's holding directly contradicts *Williams*."
>
> . . .
>
> This represents a breathtaking departure from settled Supreme Court precedent and effectively eliminates all of the benchmarks set by AEDPA and the Court for a prisoner to obtain an evidentiary hearing in federal court.

(*Id.* at A-14 to A-15.)

## REASONS FOR GRANTING REVIEW

As pointed out in the dissenting opinions of Judges Rymer and Callahan, the majority opinion conflicts with this Court's opinions in *Williams* and *Landrigan* regarding when a state prisoner may obtain an evidentiary hearing in federal court to present evidence never presented or considered by the state court that decided a federal claim. The majority opinion eviscerates AEDPA's diligence requirement, and portends routine evidentiary hearings in federal district courts on the questions of diligence and the substantive claim, contrary to the intent of AEDPA to limit such hearings.

First, the majority opinion conflicts with *Williams*, and the diligence provision of AEDPA, because Schad did not make a reasonable attempt, in light of information that was available to him, to investigate and pursue his IAC claim in state post-conviction proceedings. The state trial court dismissed the IAC-sentencing claim without an evidentiary hearing because Schad failed to file affidavits with facts supporting the claim. Moreover, Schad did not ask the district court for an evidentiary hearing on the issue of diligence, or otherwise ask for further factual development of the state court record to show his diligence. The existing state record, consisting of numerous motions for extensions of time and status conferences, was more than sufficient for the district court, and the Ninth Circuit, to determine whether post-conviction counsel was diligent. The Ninth Circuit should not have considered evidence never presented to the state courts in analyzing the diligence question. Finally, to any extent the existing record was

insufficient, the Ninth Circuit should have affirmed the district court's diligence ruling because *Williams* puts the burden of showing diligence on the prisoner.

Second, diligence aside, the majority opinion conflicts with *Landrigan* by granting an evidentiary hearing without either analyzing whether Schad presented a colorable IAC claim to the district court or the district court's alterative ruling on the merits of the claim. The district court, in a commendably thorough opinion, alternatively considered all of the new evidence Schad presented to the district court in support of the IAC-sentencing claim, but found it failed to show either deficient performance or prejudice. Rather than analyzing the district court's rulings under *Strickland v. Washington*, 466 U.S. 668 (1984), and the applicable AEDPA standards, the Ninth Circuit curtly stated it disagreed, without further explanation.

This Court should not wait to review this case several years in the future after the district court has complied with the Ninth Circuit mandate and holds one or more evidentiary hearings. This Court granted review in *Landrigan* when the Ninth Circuit erroneously ordered an evidentiary hearing. Obviously, this Court understands the damage done to the States' interests by unwarranted evidentiary hearings on federal habeas review. To allow the district court to proceed in this already protracted capital case would be to sanction the very type of delay AEDPA was enacted to prevent. Moreover, the opinion will likely result in widespread confusion in the district courts of the Ninth Circuit, and routine evidentiary hearings in

both capital and non-capital cases. Finally, this Court should grant review now because of the increasingly long list of opinions from the Ninth Circuit failing to follow this Court's opinions and flouting the provisions of AEDPA, especially in capital cases.

## I. THE NINTH CIRCUIT'S MAJORITY OPINION CONFLICTS WITH BOTH *WILLIAMS* AND *LANDRIGAN*.

### A. *The opinion conflicts with Williams.*

The panel opinion should be reversed because it ignores or misapplies *Williams* and the provisions of the AEDPA, specifically 28 U.S.C. Section 2254(e)(2), regarding the diligence that a state prisoner must show before being allowed to present newly-developed evidence to federal courts in federal habeas proceedings.

#### 1. Failure to comply with state law.

First, Schad failed to comply with *Williams* because he did not develop the factual basis for his claim in accordance with state law. This Court said in *Williams*:

> Diligence will require in the usual case that the prisoner, *at a minimum*, seek an evidentiary hearing in state court *in the manner prescribed* by state law. . . . For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the

> record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. *Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.*

529 U.S. at 437 (emphasis added).

Schad failed to show even minimal diligence under *Williams* because he did not file affidavits with the state court to support his claim of ineffective assistance at sentencing, when such information was readily available. *See also Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999) ("State law not only permitted but required Baja to come forward with affidavits or other evidence, to the extent that his claim relied on evidence outside the trial record."). Instead, he only presented affidavits from a defense investigator/expert about what she had done and what she could do in the future. (App. A-39 to A-40.) The majority opinion concedes: "The record is clear that Schad did not succeed in bringing out relevant mitigating evidence during state habeas proceedings." (*Id.* at A-45.) That a more diligent effort could have yielded results is shown by the fact that habeas counsel obtained several declarations from the family,

and the family spoke to habeas counsel's investigator and experts. (App. A-41.)

Arizona law provides that, to obtain an evidentiary hearing, a post-conviction petition must be supported by "[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition." *See* Rule 32.5, Ariz. R. Crim. P.; *State v. Borbon*, 706 P.2d 718, 725 (Ariz. 1985). The summary dismissal by the state court explicitly recognized Schad's failure to support his claim with specific evidence, as required by Arizona law:

> [D]efendant contends that counsel was ineffective for failing to uncover mitigating evidence that might exist. If the mitigation then turns out to be favorable to the defendant, resentencing might be appropriate. Defendant is simply suggesting that it would be a good thing now to delve further into defendant's prior convictions and to try once again to talk to family members, etc., etc. Defendant is simply asking to go on a fishing expedition with *no showing* of what would be turned up that the court did not already know at sentencing time and how that might affect sentencing. The claim has not [sic] merit.

(App. D-4, emphasis added.)

The majority panel opinion completely ignores the fact that Schad could have filed affidavits, with the

readily available evidence that would have provided a basis for requesting an evidentiary hearing in state court. As Judge Callahan's dissent noted, regarding the post-conviction proceedings: "Despite this wealth of time and resources, he failed to marshal any evidence regarding his own family background, and he further admitted in district court that the evidence was '*readily available.*'" (App. at A-8, emphasis in dissenting opinion). Judge Rymer's dissent notes: "This information [regarding family background] was available at the time. He had nearly four years in state post-conviction proceedings to ferret out the affidavits and evidence presented for the first time in federal court." (*Id.* at A-56.) *See Lewis v. Horn*, 581 F.3d 92, 105-06 (3rd Cir. 2009) (counsel not diligent because he failed to present any affidavits from jurors, or other evidence to substantiate his *Batson* allegations in state court). *See also Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2005) ("Diligence," for this purpose, "'depends upon whether [the petitioner] made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court[.]'")

Rather than focusing on Schad's failure to file relevant affidavits, the majority opinion simply speculates why post-conviction counsel did not file any. (App. A-43.) The opinion's failure to acknowledge Arizona law as to what is necessary to obtain an evidentiary hearing presages an evidentiary hearing in all federal habeas proceedings brought by an Arizona prisoner seeking to present new evidence to the district court. An Arizona judge does not hold a hearing on diligence in post-conviction proceedings. Instead, the

judge simply determines whether a defendant has presented affidavits such as to establish a colorable claim requiring an evidentiary hearing on the claim. The court must summarily dismiss the proceeding if the claim is not colorable. *See* Rule 32.6(c), Ariz. R. Crim. P. Because there is no state court evidentiary hearing on diligence, the majority opinion here would require an evidentiary hearing and a *de novo* factual determination of diligence in every habeas case in which newly-developed evidence is offered.

One caveat in *Williams* is that the prisoner's diligence in pursuing a claim depends on whether he has notice of the claim. This Court found counsel was not diligent regarding a *Brady* claim because he was on notice of possible exculpatory evidence. 529 U.S. at 437-44. Similarly, Schad's post-conviction counsel was on notice of the IAC sentencing claim because that was one of the claims raised in his petition. Moreover, as Judge Rymer states:

> Given that Schad had notice during post-conviction proceedings of the need to develop facts about his family background to support his claim of ineffective assistance of sentencing counsel, and the information available at the time, together with the opportunity afforded to develop that information in four years, with thirty-four extensions and with all the funding requested, I agree with the district court that Schad failed to show he was diligent in efforts to

> investigate and present those facts in state court.

(*Id.* at A-76.). *Cf. Williams v. Norris*, 576 F.3d 850, 862 (8th Cir. 2009) ("Attorney McLean was aware that trial counsel could have presented testimony by a social history expert at the penalty phase, and that he could have presented such testimony at the Rule 37 hearing to establish prejudice, . . . ").

### 2. Schad did not ask for an evidentiary hearing on diligence.

Second, without citing any authority, the Ninth Circuit remands for an evidentiary hearing on the diligence issue even though Schad did not ask the district court for a hearing to present further evidence on the diligence question. The majority opinion compounds this error by providing that the evidentiary hearing on diligence can be held simultaneously with an evidentiary hearing on the merits of the IAC-sentencing claim. (*Id.* at A-46.)

The majority avoids the issue completely by not even acknowledging that Schad never requested an evidentiary hearing on diligence. (*Id.* at A-22 & A-40 to A-46.) However, Judge Rymer points out that Schad did not ask the district court for an evidentiary hearing on diligence. (*Id.* at A-57.) The majority opinion does not even attempt to explain why Schad's failure to request a diligence hearing does not prevent a remand for a hearing that Schad never requested.

A district court's decision denying an evidentiary hearing is reviewed for an abuse of discretion. *See Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000). However, the district court could not have abused its discretion by failing to *sua sponte* grant a hearing that Schad never requested.

Moreover, the majority opinion completely eviscerates AEDPA's diligence requirement by sanctioning simultaneous hearings on diligence and the substantive IAC claim. As Judge Callahan argues, diligence is what a petitioner must show *before* he gets an evidentiary hearing. (App. at A-11.) *Williams* makes clear that a state prisoner cannot receive an evidentiary hearing unless he first shows diligence. 529 U.S. at 437 ("§ 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met.").

3. The record was sufficient.

Third, there is no need for a remand for a hearing on diligence because the state record is more than adequate to show a lack of diligence. The Ninth Circuit has itself noted that "an evidentiary hearing is not required on issues that can be resolved by reference to the state court record." *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) (emphasis deleted). The state court record in this case is more than adequate to determine diligence. Indeed, the state court record clearly establishes a lack of diligence, and if the Ninth Circuit panel majority opinion is not reversed, it is unlikely that any state court record will be deemed

sufficient and an evidentiary hearing would be required in almost every federal habeas proceeding.

The record of state post-conviction proceedings in this case was summarized by Judge Rymer:

> After a trip to the United States Supreme Court, Schad filed a post-conviction petition in state court on December 16, 1991. John Williams took over as counsel after the petition was filed, and was ordered to file a supplemental petition by February 18, 1992. That deadline was extended five times (February 14, March 18, April 17, August 6, and October 14, 1992). On November 3, 1992, Williams was replaced by Michael Chezem. Chezem successfully sought appointment of an investigator and funds (July 30, 1993), and also obtained twelve extensions (January 5, 1993, February 2, April 14, May 14, June 28, July 30, August 19, September 27, October 25, November 29, December 27, 1993, and February 1, 1994). On January 31, 1994, Chezem withdrew and was succeeded by Rhonda Repp. She obtained authorization for further investigative services in February 1994; on March 28, 1995, she asked for the services of a mitigation expert, which the court approved on July 6, 1995. Meanwhile, she asked for and received a series of extensions on the ground that she and the investigator had not completed their investigation and located all potential witnesses (February 16,

> 1994, March 18, April 22, May 24, June 23, July 22, August 30, September 27, October 31, November 21, December 28, 1994, January 18, 1995, February 21, April 20, May 22, June 20, July 21, August 22, and September 20, 1995). On September 20, 1995 the court ruled that no further continuances would be granted. A supplemental post-conviction petition was filed on October 19, 1995, together with a request for an evidentiary hearing on the basis of "newly discovered evidence." The newly discovered evidence consisted of an affidavit by the mitigation expert, Holly Wake, expressing her opinion that the presentence report failed adequately to address the seriousness of Schad's abuse; it contained no new facts and identified no witnesses. The state court denied the ineffectiveness claim in July 1996 for lack of any specifics.

(App. at A-59.)

Thus, it is very clear from this record what post-conviction counsel did and did not do. The majority opinion simply cites various obstacles post-conviction counsel faced, and then makes a great leap in logic:

> As a result, Schad was unsuccessful in bringing out any significant mitigation evidence during his state habeas proceedings, leading to the denial of his ineffective assistance of sentencing claim

> without an evidentiary hearing in state court."

(App. at A-43.) The Ninth Circuit's statement about the cause for post-conviction counsel's failure to comply with Arizona law is factually incorrect: what led to dismissal without an evidentiary hearing was counsel's failure to file any affidavits supporting his claim, which cannot be explained by the routine obstacles that post-conviction counsel face in such proceedings.

Despite the extensive state court record demonstrating counsel's lack of diligence, the majority opinion concludes: that "neither the state court nor the district court record, however, contains information sufficient to determine whether those efforts were reasonable and that Schad therefore acted diligently." (*Id.* at A-45.)

In addition to finding the state court record insufficient, the Ninth Circuit decided that new evidence never presented to the state court was relevant in determining whether counsel was diligent. (*Id.* at A-44 to A-45.) The majority stated: "In the district court, Schad presented evidence that, we conclude, if it had been presented to the sentencing court, would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating factors present in this case." (*Id.* at A-44.) Judge Rymer laments: "We are not supposed to start with the evidence newly developed for federal court, then determine whether that evidence has 'some likelihood of altering the sentencing court's evaluation, then decide that the

petitioner made a threshold showing of reasonably attempting to develop it in state court." (*Id.* at A-73.) "Rather, we are to start with diligence—asking whether the factual basis was developed in state court and if not, whether there was a lack of diligence or some greater fault attributable to the petitioner—and never get to the weight of the newly developed evidence *unless* the petitioner bears no responsibility for failure to develop and present that evidence in state court." (*Id.*, emphasis in original.)

**4. The burden was on Schad to show diligence.**

Finally, if the state court record before the district court and the Ninth Circuit was insufficient to determine diligence, an evidentiary hearing was barred because Schad had the burden of showing diligence. *See Williams*, 429 U.S. at 440 (concluding petitioner "has met the burden of showing he was diligent in his efforts to develop the facts" supporting two claims). Nevertheless, the majority opinion remanded for an evidentiary hearing on diligence because "[n]either the state court nor the district court record, however, contains information sufficient for us to determine whether or not those efforts [by counsel] were reasonable and whether Schad therefore acted diligently." (App. at A-45.)

Judge Rymer's dissent follows *Williams* and AEDPA: "However, lack of evidence of diligence in the state and federal record does not compel an evidentiary hearing, but rather, compels denial of Schad's request for an evidentiary hearing on the merits . . . because he

had the burden of showing he was diligent, didn't meet it, and § 2254(e)(2) accordingly bars an evidentiary hearing on the merits of his claim." (App. A-74.) Judge Callahan and her dissenting colleagues agreed: "The Supreme Court has made clear in *Williams* that the petitioner has the burden of establishing he was diligent of developing the evidence in the state court." (*Id.* at A-6 to A-7.)

Opinions from other circuit courts have reiterated that *Williams* puts the burden on the petitioner to demonstrate that he was diligent in attempting to develop the facts supporting his claims in state court *See Wolfe v. Johnson*, 565 F.3d 140, 167 (4th Cir. 2009); *Wilson v. Sirmons*, 536 F.3d 1064, 1079 (10th Cir. 2008); *Hutchinson v. Bell*, 303 F.3d 720, 747 (6th Cir. 2002).

Therefore, despite Schad's failure to develop the record in state court and his subsequent failure in district court to bear his burden of showing diligence in state court, the Ninth Circuit has awarded Schad a second chance to show his diligence—possibly coupled with a simultaneous evidentiary hearing on the merits of a claim for which he has yet to show diligence.

B. *The opinion conflicts with Landrigan.*

As pointed out by Judge Callahan's dissent, the Ninth Circuit majority panel opinion also conflicts with *Landrigan*. (App. A, at A-4 & A-11 to A-14.) That dissent concludes that: "The majority's endorsement of an evidentiary hearing on the merits of Schad's IAC claim without any consideration of whether he presents

a colorable claim under Strickland or AEDPA represents a troubling departure from settled law." (*Id.* at A-13.) After considering the new evidence Schad proffered in district court, that court concluded that trial counsel presented a strategically sound case in mitigation, and that the newly developed information is not of sufficient weight to create a reasonable probability that, if it had been presented, the trial court would have reached a different determination. (App. B-87 to B-100.)

Judge Rymer's dissent noted that the majority panel opinion was without regard to "the district court's extensive and reasoned holding in the alternative that, even considering the newly developed information, Schad was nevertheless not entitled to an evidentiary hearing on his ineffective assistance claim," "without regard to the state court's ruling that denied Schad's ineffective assistance claim on the merits," and "without reference to AEDPA, *Strickland*, or the double deference owed to state court adjudications under *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009); *Schriro v. Landrigan*, 550 U.S. 465, 470 (2007)." (App. at A-75.) Judge Rymer found it "inappropriate to order an evidentiary hearing or ineffective assistance of counsel without touching these bases." (*Id.* at A-76.)

This Court has instructed that: "In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254 (e)(2), the decision to grant such a hearing rests in the discretion of the district court." *Landrigan*, 550 U.S. at 468. When there is no § 2254 (e)(2) bar, "[i]n deciding

whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474. A district court is not required to hold an evidentiary hearing "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief," *Id.* And, "the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." *Landrigan*, 550 U.S. at 474.

The Ninth Circuit opinion fails to apply *Landrigan*. Indeed, it does not even cite *Landrigan*. (App. A, at 45.) Rather than analyzing whether the district court abused its discretion under *Landrigan* by denying an evidentiary hearing, the majority opinion tersely states:

> [W]e recognize the district court stated it had considered the new evidence proffered by Schad in support of his ineffective assistance of counsel claim and said that, even assuming diligence, this new evidence could not justify relief. *We disagree with that ruling.*

(*Id.*, emphasis added.)

Thus, the majority opinion failed to analyze whether Schad presented a colorable IAC claim. In its opinion in *Landrigan*, the Ninth Circuit at least

examined the record for whether there was a colorable claim, and found that there was. *Landrigan v. Schriro*, 441 F.3d 638 (9th Cir. 2006). In this AEDPA case, the Ninth Circuit ignored *Landrigan's* mandate, finding it sufficient analysis to simply say it disagreed with the district court's extensive alternative findings. In this case, as in *Landrigan*: "[T]he District Court was well within its discretion to determine that, even with the benefit of an evidentiary hearing, [the prisoner] could not develop a factual record that would entitle him to habeas relief." 550 U.S. at 475.

*Landrigan* sets forth a two-step analysis regarding review of the district court's denial of an evidentiary hearing: (1) whether there was diligence; (2) if there was diligence, whether the prisoner had raised a colorable claim such that the district court abused its discretion by denying an evidentiary hearing. Other opinions from the Ninth Circuit have followed this two-step analysis. *See West v. Ryan*, 608 F.3d 477, 484-489 (9th Cir. 2010) (assuming diligence, district court did not abuse its discretion by denying evidentiary hearing on *Strickland* claim); *Horton v. Mayle*, 408 F.3d 570, 582 n. 6 (9th Cir. 2005) ("here we assess the availability of an evidentiary hearing under pre-AEDPA law because Horton exercised sufficient diligence in seeking to develop the factual basis of his claim in the state court proceedings."). Other circuits have followed the two-step analysis *See Alverson v. Workman*, 595 F.3d 1142, 1163 (10th Cir. 2010) (assuming prisoner was diligent in developing the factual basis of his claims in state court, he did not show evidentiary hearing would have aided his cause); *Palmer v. Hendricks*, 592 F.3d 386, 392-394 & 399-400

(3rd Cir. 2010) (no *prime facie* showing of ineffective assistance of counsel); *Abdus-Samad v. Bell*, 420 F.3d 614, 626 (6th Cir. 2005) (regardless of diligence, no abuse in denying evidentiary hearing when he did not show no reasonable fact-finder would have found him guilty); *Turner v. Crosby*, 339 F.3d 1247, 1274 (11th Cir. 2003) (even if allegations in prisoner's appendix were taken as true, no error in denying hearing where new information did not show ineffective assistance of counsel at penalty phase of capital trial); *Channer v. Brooks*, 320 F.3d 188, 199-200 (2nd Cir. 2003) (even if prisoner was diligent, no need for hearing new information not material to issue); *Clark v. Johnson*, 227 F.3d 273, 284 (5th Cir. 2000) (even if AEDPA diligence standard was met, no abuse of discretion in denying hearing when no significant factual dispute and no showing how IAC claim would be advanced by a hearing).

Nor did the Ninth Circuit explain why the district court abused its discretion by considering the new evidence and denying the claim on the merits, in lieu of having an evidentiary hearing. Other circuit opinions have held that that the district court did not abuse its discretion in considering new material by expanding the record in lieu of holding an evidentiary hearing. *See Boyko v. Parke*, 259 F.3d 781 (7th Cir. 2001); *Brown v. Johnson*, 224 F.3d 461, 469 (5th Cir. 2000); *Cardwell v. Greene*, 152 F.3d 331, 338-39 (4th Cir. 1998), *overruled on other grounds by Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000). *See also* Rule 8, Rules Applicable to § 2254 Proceedings.

The district court alternatively considered the extensive new evidence presented by Schad, and discussed why Schad had not shown either deficient performance or prejudice. (App. B-87 to B-100.) In another recent Ninth Circuit opinion, a different panel reviewed the IAC-sentencing claim in light of the new evidence presented and considered by the district court, and agreed with the district court that the prisoner's *Strickland* claim failed. *Rhoades v. Henry*, ___ F.3d ___, 2010 WL 2778693, *7 (9th Cir. July 15, 2010).

The Ninth Circuit failed to evaluate the IAC claim under *Bobby v. Van Hook*, 130 S. Ct. 13, 15 (2009) (pre-AEDPA); *Wong v. Belmontes*, 130 S. Ct. 383, 386 (2009), or *Porter v. McCollum*, 130 S. Ct. 447 (2009). Instead, it merely lectured the district court to reconsider the IAC claim in light of *Wong* and *Porter*. (App. A, at A-46.)

The Ninth Circuit, without explaining why the district court abused its discretion, merely said that the new evidence presented in district court "demonstrated at least some likelihood of altering the sentencing court's evaluation" because "the evidence Schad presented to the district court was stronger than the evidence presented at sentencing." (*Id.* at A-44 & A 46.) Of course the new evidence was "stronger" regarding Schad's family history than that presented at sentencing, and that is why the district court considered the new evidence before determining it would not have made a difference in the sentence.

Neither Schad nor the Ninth Circuit have indicated what additional evidence would be presented

at an evidentiary hearing that would alter the district court's analysis of the merits. *See Rhoades*, at *8. The new evidence considered by the district court included: "an extremely detailed discussion of the psychological impact of Schad's abusive childhood" from psychologist Charles Sanislow; another declaration from psychologist Leslie Lebowitz discussing the mental health of Schad's parents, declarations from family members and statements from family members as told to an investigator, and extensive mental health records of his mother, father, and brother. (App. A-41.)

This Court in *Landrigan* endorsed the utility of a "paper hearing." *Landrigan*, 550 U.S. at 474. This Court, based on the existing record, reversed the Ninth Circuit's ordering an evidentiary hearing on ineffective assistance of counsel at sentencing. Even though the district court in *Strickland* had granted an evidentiary hearing, this Court decided the ineffective assistance claim "without regard to the evidence presented at the District Court hearing." 466 U.S. at 700.

This Court has long recognized that discovery and expansion of the record can be used to avoid the need for an evidentiary hearing. *See Blackledge v. Allison*, 431 U.S. 63, 81-82 (1977). The Ninth Circuit itself has previously stated that expansion of the record is a permissible alternative to avoid the necessity of an "expensive and time-consuming hearing." *See Williams v. Woodford*, 384 F.3d 567, 590-91 (9th Cir. 2004). The Ninth Circuit here remands for an unnecessary, expensive, and time-consuming hearing in an already much delayed case.

## II. THIS COURT SHOULD GRANT REVIEW NOW, RATHER THAN CONSIDERING REVIEW AFTER DISTRICT COURT PROCEEDINGS ON REMAND AND SUBSEQUENT NINTH CIRCUIT REVIEW.

This Court could wait to consider review until the conclusion of district court proceedings or remand, and subsequent Ninth Circuit review of those proceedings. However, that would sanction the very delay in this case that this Court's opinions and AEDPA proscribe. As Justice Callahan noted in the dissent from the denial of rehearing:

> After more than thirty years of litigation, this case has not come to rest. Schad was convicted of first-degree murder in 1979, and was sentenced to death in 1985 following a retrial. The majority's order remanding for 'further proceedings' and a possible evidentiary hearing ensures that the litigation will continue for several more years despite every indication that it should end.

(App. A-4 to A-5.) *See also Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, . . . and to further the principles of comity, finality, and federalism." (internal quotes omitted)); *Williams v Taylor*, 529 U.S. 362, 386 (2000) (Stevens, J.) ("Congress wished to curb delays, to prevent 'retrials on federal habeas, and to give effect to state convictions to the extent possible under law.").

To allow further, unwarranted delay in this AEDPA case would make a mockery of AEDPA provisions and this Court's opinions limiting evidentiary hearings in federal courts. The Ninth Circuit opinion portends the routine evidentiary hearings that this Court has found contrary to AEDPA:

> *Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.*

*Williams*, at 437 (emphasis added).

As Judge Callahan and her fellow dissenters warn:

> The practical consequences of this holding are substantial. The majority opinion creates a precedent for future habeas petitions demanding further proceedings and evidentiary hearings on whether they were diligent in developing evidence in state court. Moreover, if on this record an appeals court can find the evidence of diligence to be insufficient, "further proceedings" and "hearings" will almost always be necessary before a district court can deny an evidentiary hearing for lack of diligence in state court, Such a result is clearly contrary [to 2254 and *Williams*], and the majority's revision of the law is

> likely to engender confusion among the district courts as well as disparate outcomes in their rulings on state prisoners' requests for evidentiary hearings.

(App. at A-10.)

In *Landrigan*, this Court considered and reversed the Ninth Circuit's improperly granting an evidentiary hearing. This Court reminded the Ninth Circuit that an evidentiary hearing is not required in every federal capital habeas review. "If district courts were required to allow federal habeas applicants to develop even the most insubstantial factual allegations in evidentiary hearings, district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts." 550 U.S. at 475.

But things have gotten worse in the Ninth Circuit since *Landrigan*, not better. *See, e.g., Pinholster v. Ayers*, 590 F.3d 651, 692 (9th Cir. 2009) (C.J. Kozinski, dissenting) ("The majority now provides a handy-dandy road map for circumventing this requirement: A petitioner can present a weak case to the state court, confident that his showing won't justify an evidentiary hearing. Later, in federal court, he can substitute much stronger evidence and get a district judge to consider it in the first instance, free of any adverse findings the state court might have made."), *cert. granted sub nom. Cullen v. Pinholster*, ___ U.S. ___, 2010 WL 887427 (June 14, 2010).

A footnote in Judge Callahan's dissent lists numerous opinions from this Court reversing the Ninth Circuit for failing to follow AEDPA's provisions. (App. at A-13, fn. 2.) *See also Doody v. Schriro*, 596 F.3d 620, 659-660 (9th Cir. 2010) (J. Tallman, dissenting) (listing Ninth Circuit opinions found not to comply with AEDPA).

The Ninth Circuit's failure to follow the AEDPA has been most damaging to the States in capital cases: "The majority's methodology, which reflects the perceived wisdom in this court, has become an unstoppable engine for setting aside death sentences." *Pinholster*, 590 F.3d at 692 (C.J. Kozinski dissenting).

Another member of the Ninth Circuit has complained that there is "an unspoken rule in our circuit that anyone sentenced to death had ineffective assistance of counsel during the sentencing phase of his trial or at least needs an evidentiary hearing decades after sentencing to find out." *Stanley v. Schriro*, 598 F.3d 612, at 628 & fn. 3 (9th Cir. 2010) (J. Kleinfeld, concurring in part and dissenting in part). The "unspoken rule" is shown by the number of Arizona capital cases in which the Ninth Circuit has granted relief either by remanding for an evidentiary hearing or ordering the state courts to re-sentence the prisoner, based on perceived ineffective assistance of counsel at sentencing. In just the last two years, the Ninth Circuit has remanded or reversed this case and six other Arizona capital cases after finding ineffective assistance at sentencing: *Detrich v. Ryan*, 2010 WL 3274500 (9th Cir. Aug. 20, 2010) (re-sentencing); *Stanley* (remanded to district court for evidentiary hearing); *Robinson v.*

*Schriro*, 595 F.3d 1086 (9th Cir. 2010) (re-sentencing). *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009) (re-sentencing after rejecting district court's findings and conclusions following federal district court evidentiary hearing); *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009) (re-sentencing); *Scott v. Schriro*, 567 F.3d 573 (9th Cir. 2009) (remanded for evidentiary hearing). The same pattern is seen in earlier cases. *See Lambright v Stewart*, 241 F.3d 1201 (9th Cir. 2001) (remanded for evidentiary hearing)—*subsequent opinion Lambright v. Schriro*, 490 F.3d 1103, 1128 (9th Cir. 2007) (re-sentencing after rejecting district court's findings and conclusions following federal district court evidentiary hearing); *Smith (Joe Clarence) v. Stewart*, 189 F.3d 1004 (9th Cir. 1999) (re-sentencing); *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999) (re-sentencing); *Smith (Bernard) v. Stewart*, 140 F.3d 1263 (9th Cir. 1998) (re-sentencing); *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998) (remanded for an evidentiary hearing), *subsequent opinion in Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008) (re-sentencing, rejecting district court's findings and conclusions following evidentiary hearing); *Summerlin v. Schriro*, 427 F.3d 623 (2005) (re-sentencing), *cert. granted and reversed by Schriro v Summerlin*, 542 U.S. 348 (2004).

The Ninth Circuit's opinion is contrary to, and misapplies, *Williams*. It is contrary to, and ignores *Landrigan*. It eviscerates AEDPA's limits on evidentiary hearings in federal court that prevent prisoners from presenting evidence never presented to the state courts. It allows district courts to hold evidentiary hearings on substantive claims before determining whether prisoners diligently developed the

facts concerning the claims in the state courts. This Court should grant review to insure that the Ninth Circuit follows *Williams*, *Landrigan*, and AEDPA, and forestall unwarranted federal court re-trials on issues not properly presented to the state courts.

## CONCLUSION

This Court should grant the petition for writ of certiorari, and reverse that part of the Ninth Circuit opinion remanding to the district court for additional proceedings.

Respectfully submitted

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APPENDIX A

FOR PUBLICATION

# UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT.

| | | |
|---|---|---|
| Edward Harold Schad, *Petitioner-Appellant*, | ) | No. 07-99005 |
| v. | ) | D.C. No. |
| Charles L. Ryan,* Arizona Department of Corrections, *Respondent-Appellee.* | ) | CV-9702577-PHX ROS ORDER AND AMENDED OPINION |

Appeal from the United States District Court
For the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted
May 14, 2009—San Francisco, California

Filed Sept. 11, 2009.
Amended Jan. 12, 2010.
Second Amendment June 3, 2010.

Before: Mary M. Schroeder, Stephen Reinhardt and Pamela Ann Rymer, Circuit Judges

*Charles L. Ryan is substituted for his predecessor Dora B. Schriro as Director of the Arizona Department of Corrections. See Fed. R. App. P. 43(c)(2).

## COUNSEL

Kelley J. Henry, Nashville, Tennessee, for the petitioner-appellant.

Jon G. Anderson, Phoenix, Arizona, for the respondent-appellee.

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## ORDER

The amended opinion filed January 12, 2010 is hereby amended. The amended opinion is filed concurrently with this order.

Judges Schroeder and Reinhardt have voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge Rymer has voted to grant the petition for panel rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R.App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Absent further order of the court, no further petitions for rehearing or rehearing en banc will be considered.

Judge CALLAHAN, with whom KOZINSKI, Chief Judge, and O'SCANNLAIN, KLEINFELD, GOULD, TALLMAN, BEA, IKUTA Circuit Judges, join, dissenting from the denial of rehearing en banc:

Judge Rymer's dissent persuasively explains why the majority decision to remand for "further proceedings" and an evidentiary hearing on "diligence" and the merits of Schad's ineffective assistance of counsel claim conflicts with AEDPA's diligence requirement, 28 U.S.C. § 2254(e)(2), and the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 420 (2000). *See* Amended Slip Op. at 7901-16 (Rymer, J., concurring in part, dissenting in part). I write separately to point out the gravity of the majority's departure from settled Supreme Court law, and to emphasize how it effectively eviscerates AEDPA's diligence requirement as well as the preliminary showing the Supreme Court has held a state prisoner must make in order to obtain an evidentiary hearing in federal court.

I.

The majority opinion substantially erodes AEDPA's requirement that a person challenging the constitutionality of his state conviction diligently pursue his claim in state court in order to obtain an evidentiary hearing in federal court. 28 U.S.C. § 2254(e)(2). Not only does the majority's decision contravene the Supreme Court's decision in *Williams* by permitting an evidentiary hearing in the absence of an initial showing of diligence by the petitioner, it effectively eviscerates the diligence requirement

altogether by endorsing a simultaneous hearing on both the petitioner's "diligence" and the merits of his claim of ineffective assistance of counsel ("IAC"). In approving of a single hearing on both issues, the court allows a petitioner to present new evidence on the merits of his underlying claim in a full-blown evidentiary hearing without first establishing that he was diligent in developing such evidence in state court. Moreover, the majority's decision effectively eliminates the requirement that a petitioner present a colorable claim for federal habeas relief before a federal court may grant an evidentiary hearing. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). The potential for mischief created by the majority's approach is evident here, where it urges an evidentiary hearing on the merits of Schad's IAC claim without ever considering the "double deference" owed under *Strickland v. Washington*, 466 U.S. 668 (1984) and AEDPA. *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009) (explaining that a federal court's evaluation of "a *Strickland* claim" under § 2254(d)(1) must be deferential to both the state court's decision and counsel's strategic choices). We should have reheard this case en banc to rectify these departures from Supreme Court precedent and to correct what district courts in our circuit are likely to perceive as a confusing directive to hold evidentiary hearings where Congress and the Supreme Court have determined that none are permitted.

A.

After more than thirty years of litigation, this case has not come to rest. Schad was convicted of first-degree murder in 1979, and was sentenced to death in

1985 following a retrial. The majority's order remanding for "further proceedings" and a possible evidentiary hearing ensures that the litigation will continue for several more years despite every indication that it should end.

AEDPA provides that a district court "*shall not*" hold an evidentiary hearing if the petitioner has not been diligent in developing the factual basis for his claim in state court. 28 U.S.C. § 2254(e)(2) (emphasis added). "Diligence ... depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court...." *Williams*, 529 U.S. at 435. As the Supreme Court explained in *Williams*, AEDPA's insistence that a petitioner diligently attempt to develop evidence supporting his claims in state court is grounded in principles of comity:

> Comity ... dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner *must be diligent in developing the record* and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met.

> *Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.*

*Id.* at 437 (citations and internal quotation marks omitted) (emphasis added).

Disregarding the Supreme Court's admonition that "[f]ederal courts sitting in habeas are not an alternative forum for trying facts" the petitioner failed to develop in state court, the majority remands this case to the district court so that Schad may have an opportunity to do just that. The majority attempts to justify its remand by concluding that (1) the record is insufficient to determine whether Schad was diligent in developing the evidence he seeks to present in federal court, and (2) the district court erred by not focusing on the "reasonableness" of Schad's efforts to do so. Neither conclusion withstands scrutiny.

The majority's first misstep is its failure to recognize that Schad has the burden of establishing his diligence in state court. Ignoring glaring evidence of Schad's lack of diligence, the majority concludes that the record in this case is "insufficient" for it to determine whether or not his efforts in state court were "reasonable." Amended Op. at 7893. However, were the record in this case truly "insufficient" to determine Schad's diligence, that would definitively end the inquiry of whether or not he is entitled to an evidentiary hearing. The Supreme Court made clear in *Williams* that the petitioner has the burden of establishing that he was diligent in developing the

evidence in the state court. 529 U.S. at 440. Thus, where a petitioner presents a record that does not sufficiently demonstrate diligence, he necessarily fails to meet his burden and is not entitled to an evidentiary hearing. Despite the clarity of the Supreme Court's guidance on this issue, the majority reaches a contrary conclusion, effectively holding that a petitioner's failure to demonstrate diligence in the first instance entitles him to "further proceedings" and a possible evidentiary hearing in order to try once more to make the necessary showing. This clearly contravenes *Williams*, eliminating the threshold showing of diligence the Supreme Court has held a petitioner must make in order to obtain an evidentiary hearing in federal court.

The majority's second mistake is its assertion that the district court misapplied *Williams* by focusing on Schad's "lack of success" in developing the evidence rather than the reasonableness of his efforts. Amended Op. at 7893. This is a mischaracterization of the record and the standard set forth in *Williams*.

The district court's published decision reveals that it did consider Schad's efforts to develop evidence in state court and found them to be less than diligent. *Schad v. Schriro*, 454 F.Supp.2d 897, 955-56 (D. Ariz. 2006). Specifically, the district court observed that Schad was granted thirty-four extensions of time to file an amended petition with supporting evidence but that he failed to do so. Further, the district court rejected Schad's contention that a denial of funds was to blame for his failure, noting that he could point to no funding request that the state court had denied. *Id.* at 955. The

district court also rejected Schad's assertion that the state court wrongly denied him an opportunity to develop his claims in an evidentiary hearing, noting that the state court's refusal to hold an "evidentiary hearing was attributable to Schad's failure to develop a factual record that would have warranted a hearing." *Id.* at 955-56.

The record clearly shows that the district court considered and rejected Schad's contention that he was diligent in his efforts to develop evidence in state court. Furthermore, the record is not reasonably subject to dispute with regard to Schad's diligence. Schad had nearly four years in state court to uncover the evidence he now brings to federal court; he requested, and was granted, thirty-four extensions of time; and, he was provided with funds, an investigator, and a mitigation expert. Despite this wealth of time and resources, he failed to marshal any evidence regarding his own family background, and he further admitted in district court that the evidence was "*readily available*." *Id.* at 943, 955 (emphasis added).

The clarity of this record should foreclose a remand for "further proceedings" and a possible evidentiary hearing on the issue of Schad's diligence. Indeed, the majority does not explain what further facts remain to be developed regarding the "reasonableness" of Schad's efforts that the district court has not already heard.

However, it is not just my disagreement with the majority's decision to remand that prompts my dissent. Rather, I dissent from the denial of rehearing en banc

because a remand for "further proceedings" and evidentiary hearing on this record renders the standard set forth in *Williams* meaningless.

The majority's critical error lies in its failure to recognize that where a petitioner admits that the evidence was "readily available" in state court and the record shows that he failed to "bring it out," the "reasonableness" of his efforts is not subject to debate. Although the Supreme Court has held that an evidentiary hearing may be permitted where a petitioner, despite his diligence, was unable to develop evidence in state court, it has *never* authorized "further proceedings" and an evidentiary hearing where the petitioner fails to make an initial showing of diligence and admits that the evidence could have been developed in state post-conviction proceedings. *See Williams*, 529 U.S. at 433-35, 437. Rather, in such circumstances, the Court has held that AEDPA *prohibits* an evidentiary hearing. *See id.* (emphasis added). The majority's opinion turns this holding on its head.

Moreover, the majority's attempt to distinguish between the "reasonableness" of Schad's efforts and his "lack of success" in bringing out evidence is illusory. It conveniently ignores the reality that Schad's "lack of success" in bringing forth evidence is directly attributable to his abysmal efforts in developing it.

Thus, although the majority purports to rely on *Williams*, in reality, its decision is an impermissible reinterpretation of *Williams* that creates a wide, new avenue around AEDPA's diligence bar. In other words,

by holding that a prisoner need not make an initial showing of diligence in state court to obtain a hearing in federal court, and by holding that a prisoner's efforts might be deemed "reasonable" and subject to closer examination in an evidentiary hearing even where he admits that the evidence he seeks to present was available in state court, the majority effectively re-writes *Williams* and eliminates AEDPA's diligence requirement.

The practical consequences of this holding are substantial. The majority opinion creates a precedent for future habeas petitioners demanding further proceedings and evidentiary hearings on whether they were diligent in developing evidence in state court. Moreover, if on this record an appeals court can find the evidence of diligence to be insufficient, "further proceedings" and "hearings" will almost always be necessary before a district court can deny an evidentiary hearing for lack of diligence in state court. Such a result is clearly contrary to the plain meaning of § 2254(e)(2), as well as the Court's interpretation of that provision in *Williams*, and the majority's revision of the law is likely to engender confusion among the district courts as well as disparate outcomes in their rulings on state prisoners' requests for evidentiary hearings.

B.

The majority opinion does further violence to AEDPA's diligence requirement by commingling the diligence issue with Schad's underlying IAC claim, and endorsing a simultaneous hearing on both.

First, although the majority has made minor amendments to its opinion, it continues to hold that an evidentiary hearing on the issue of diligence is appropriate. I reiterate that this contradicts the Supreme Court's holding in *Williams* that "diligence" is the very thing a petitioner must establish to get a hearing in the first instance. *See Williams*, 529 U.S. at 433-34, 437.

Second, by concluding that a petitioner may present evidence on the merits of his IAC claim at a "diligence hearing," the majority eviscerates the diligence requirement altogether. Under the majority's approach, a petitioner may present new evidence on the merits of his underlying claim in the same hearing at which he attempts to establish his diligence. This novel procedure relieves the petitioner of his initial burden of establishing diligence in state court, and allows him to proceed immediately to a full-blown evidentiary hearing on the merits of his underlying claim. This contravenes *Williams*, ignores the principles of comity underlying that decision, and sets a precedent for the granting of evidentiary hearings in our circuit where Congress and the Supreme Court have determined none are permitted.

C.

Not only does the majority's approach contravene *Williams*, it also is in direct conflict with other Supreme Court authority governing a habeas petitioner's ability to obtain an evidentiary hearing in federal court.

In *Landrigan*, the Court held that when determining whether to grant a prisoner's request for an evidentiary hearing, "a federal court must consider whether such a hearing could enable" the prisoner "to prove ... factual allegations, which, if true, would entitle [him] to federal habeas relief." 550 U.S. at 474. The Court explained that whether a prisoner presents a colorable claim for relief is a question governed by AEDPA, and therefore, federal courts must take into account AEDPA's deferential standards in deciding whether an evidentiary hearing is appropriate. *Id.* (citations omitted).

The majority's opinion ignores this requirement, as it remands for further proceedings and an evidentiary hearing on the merits of Schad's IAC claim simply "because the evidence Schad presented to the district court was *stronger than* the evidence presented at sentencing."[1] Amended Op. at 7894 (emphasis added).

As Judge Rymer explains in her dissent, the majority does not once consider whether Schad has presented a colorable claim of ineffective assistance of

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[1] It will be a rare case in which a prisoner claiming ineffective assistance of counsel cannot offer "stronger evidence" of deficient performance in post-conviction proceedings than was available at sentencing. Indeed, we have repeatedly declined to address *Strickland* claims in direct appeals precisely because such a claim may be better presented following development of facts outside the original record. *See, e.g., United States v. Daychild*, 357 F.3d 1082, 1095 (9th Cir. 2004) (citing *United States v. Houtchens*, 926 F.2d 824, 828 (9th Cir.1991)).

counsel under the highly deferential standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), nor does it consider whether the state court decision denying that claim was objectively unreasonable or contrary to clearly established Supreme Court precedent under AEDPA. 28 U.S.C. § 2254(d); *Landrigan*, 550 U.S. at 478. The majority's determination that an evidentiary hearing is nonetheless appropriate ignores the Supreme Court's instruction for federal courts to consider "the deferential standards prescribed by § 2254" in determining whether a petitioner has made the necessary showing to obtain an evidentiary hearing. *Landrigan*, 550 U.S. at 474. Moreover, it runs counter to the Supreme Court's directive to accord "double deference" to state court decisions adjudicating IAC claims. *Mirzayance*, 129 S.Ct. at 1420.

The majority's endorsement of an evidentiary hearing on the merits of Schad's IAC claim without any consideration of whether he presents a colorable claim under Strickland or AEDPA represents a troubling departure from settled law.[2]

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[2] It is, however, not the first time we have failed properly to apply the standards established by AEDPA. *See, e.g.*, *McDaniel v. Brown*, 130 S.Ct. 665, 673 (2010) (per curiam) (reversing for failure to apply AEDPA properly); *Mirzayance*, 129 S.Ct. at 1420 (reversing our application of AEDPA and *Strickland*); Waddington v. Sarausad, 129 S.Ct. 823, 831-35 (2009) reversing for failure to apply AEDPA properly); *Uttecht v. Brown*, 551 U.S. 1, 10 (2007) (same); *Schriro v. Landrigan*, 550 U.S. 465 (2007) (reversing our application of AEDPA and *Strickland*); *Carey v. Musladin*, 549 U.S. 70, 73 (2006) (reversing for failure to apply AEDPA properly); *Rice v. Collins*, 546 U.S. 333 (2006) (same); *Kane v. Garcia Espitia*, 546 U.S. 9 (2005) (per curiam) (same); *Brown v. Payton*, 544 U.S. 133, (Continued)

Moreover, its failure to pay heed to the governing Supreme Court decisions paves the way for unwarranted evidentiary hearings on even meritless claims.

II.

In sum, the majority's seemingly innocuous decision to remand for "further proceedings," including a possible evidentiary hearing concerning both the issue of Schad's diligence and the merits of his IAC claim is, in reality, a substantial revision of § 2254(e)(2) and governing Supreme Court authority.

It effectively eviscerates AEDPA's diligence requirement by (1) eliminating the threshold showing of diligence required to obtain an evidentiary hearing, (2) permitting an evidentiary hearing on the issue of diligence itself, and (3) endorsing simultaneous hearings on both the issue of "diligence" and the merits of a petitioner's underlying claim.

By endorsing evidentiary hearings on the issue of "diligence," even when the record clearly shows that the evidence was readily available in state court, the majority's holding directly contradicts *Williams*.

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136 (2005) (same); *Yarborough v. Alvarado*, 541 U.S. 652, 655 (2004); *Middleton v. McNeil*, 541 U.S. 433, 436 (2004) (per curiam) (same); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) (reversing our application of AEDPA and *Strickland*); *Lockyer v. Andrade*, 538 U.S. 63, 66 (2003) (reversing for failure to apply AEDPA properly); *Woodford v. Visciotti*, 537 U.S. 19, 20 (2002) (per curiam) (reversing our application of AEDPA to state court decision denying petitioner's claim under *Strickland*); *Early v. Packer*, 537 U.S. 3, 4 (2002) (per curiam) (reversing for failure to apply AEDPA properly).

Furthermore, and perhaps most troubling, the majority's endorsement of a simultaneous evidentiary hearing on both "diligence" and the merits of a prisoner's underlying claim is made without any reference to AEDPA or to governing Supreme Court law requiring the prisoner to present a colorable claim for federal habeas relief before he is granted a hearing in federal court. Instead, the majority's precedential decision permits a petitioner to argue that his failure to marshal readily available evidence was "reasonable," and that, therefore, he is entitled to an evidentiary hearing not only on the issue of diligence (in contravention of *Williams*) but also on the merits of his IAC claim without any regard for the standards established by AEDPA or *Strickland*.

This represents a breathtaking departure from settled Supreme Court precedent and effectively eliminates all of the benchmarks set by AEDPA and the Court for a prisoner to obtain an evidentiary hearing in federal court. For these reasons, I respectfully dissent from the decision not to rehear this case en banc.

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## OPINION

PER CURIAM

### I. Overview

Edward Harold Schad was convicted in Arizona state court in 1979 of the murder of Lorimer Grove, and sentenced to death. After his first conviction and

sentence were reversed by the Arizona Supreme Court on collateral review, Schad was re-tried in 1985, and was again convicted of first-degree murder and sentenced to death. His direct appeal and state habeas proceedings from his second trial lasted for the next twelve years, and his federal habeas proceedings in district court for nine years after that. After the district court denied Schad's federal habeas petition on all grounds, he filed this appeal in 2007.

Schad's appeal raises seven principal contentions. Three pertain to his conviction and four to the imposition of the death sentence. The challenges to the conviction include a claim of a *Brady* violation in the state's failure to disclose impeachment material relating to the credibility of a prosecution witness; a claim of ineffective assistance during the guilt phase of trial; and a challenge to the sufficiency of the evidence in support of first-degree murder.

Schad's four challenges to the sentence include claims of ineffective assistance during the penalty phase, application of an unconstitutionally narrow standard for determining the admissibility of mitigating evidence, improper use of a prior conviction to establish two aggravating factors, and insufficiency of the evidence underlying a third aggravating factor.

With respect to the conviction, the important issue involves the state's admitted failure to produce letters written in 1979 by a detective and a prosecutor to assist the state's witness, Duncan, in an unrelated California prosecution. With respect to the sentence, the key issue is whether the district court erred by

denying the claim of ineffective assistance of counsel at the penalty phase without holding an evidentiary hearing to consider substantial additional mitigating evidence. The district court ruled Schad failed to exercise diligence in bringing the new evidence out during his state habeas proceedings, but it did so without appropriate consideration of the many reasons Schad offered for his inability to produce the mitigating evidence during the state proceedings.

We affirm the district court's denial of habeas relief for the conviction. With respect to sentencing, we conclude that the district court applied the wrong diligence standard to deny Schad an evidentiary hearing on his sentencing ineffectiveness claim. We vacate the district court's denial of habeas relief and remand for the court, using the correct diligence standard, to determine whether an evidentiary hearing is warranted on Schad's claim of ineffective assistance at the penalty phase of his trial for failure to present material mitigating evidence.

## II. Facts and Procedural Background

This is a case with strong circumstantial evidence pointing to the defendant's guilt and to no one else's. The victim, Lorimer Grove, a 74-year-old resident of Bisbee, Arizona, was last seen on August 1, 1978, when he left Bisbee driving his new Cadillac, coupled to a trailer, to visit his sister in Everett, Washington. Grove may have been carrying up to $30,000 in cash.

On August 9, 1978, Grove's body was discovered in thick underbrush down a steep embankment off the shoulder of U.S. Highway 89, several miles south of Prescott, Arizona. The medical examiner determined that the cause of death was ligature strangulation accomplished by means of a sash-like cord, still knotted around the victim's neck. According to the medical examiner, Grove had been strangled using a significant amount of force, resulting in breaking of the hyoid bone in his neck and the reduction of his neck circumference by approximately four inches. The time of death was estimated to be four to seven days prior to discovery of the body.

No physical evidence at the crime scene implicated Schad in Grove's murder, and there was no evidence of a prior connection between the two men. There was, however, ample evidence establishing Schad's presence in Arizona at the time of the crime and his possession, after the date Grove was last seen, of Grove's property, including his Cadillac, credit cards and jewelry.

On August 3, 1978, two days after Grove left Bisbee, and six days before his body was discovered, an Arizona highway patrolman found an abandoned Ford Fairmont sedan alongside Highway 89, approximately 135 miles north of where Grove's body was discovered. The Ford was unlocked, except for the trunk, and its license plates were missing. A check of the Fairmont's VIN revealed that Schad had rented the car from a Ford dealership in Utah in December 1977, had failed to return it, and that the dealership had reported it as stolen.

According to Schad's girlfriend, Wilma Ehrhardt, she and Schad, along with Ehrhardt's children, had driven the car from Utah to New York, Florida, and Ohio between December 1977 and July 1978. In late July, Schad told Ehrhardt he was going to look for work and left Ohio with the Ford. Ehrhardt and the children remained in Ohio, but later returned to Utah.

When police impounded the Ford on August 3, 1978, they found in it, among other things, three Arizona newspapers dated July 31 and August 1, 1978, the days just before the estimated date of Grove's murder, as well as a special mirror device later identified by witnesses as an object Grove invented to help him couple his trailer to his Cadillac.

According to credit card records, on August 2, 1978, Schad began driving the Cadillac from Arizona eastward, using Grove's credit cards to make purchases in numerous cities along the way. On August 2, Schad used Grove's credit card to purchase gasoline in Benson, Arizona. On August 3, Schad used the card to purchase gas in Albuquerque, New Mexico. For approximately the next month, Schad continued traveling the country in the Cadillac and using Grove's credit card. Schad also used Grove's checkbook to forge a check to himself from Grove's account, which he cashed on August 7, 1978, in Des Moines, Iowa.

In New York state on September 3, 1978, Schad, still driving Grove's Cadillac, was stopped for speeding by a New York state highway trooper. Schad told the

trooper he was delivering the car to New York on behalf of a "rather elderly " man named Larry Grove. Schad could not produce the car's registration, and instead gave the trooper the registration for Grove's trailer. The trooper issued Schad a citation and let him go.

Schad then drove back across the country, reuniting with Ehrhardt in Salt Lake City, Utah, on September 7, 1978. A man who was living with Ehrhardt at the time, John Duncan, contacted Salt Lake City police the same day to report that Schad had told him the Cadillac was stolen. Schad was arrested in Salt Lake City on September 8.

After Schad's arrest, Salt Lake City police impounded and searched the Cadillac. From the Cadillac's title application, found in the car, the police learned that the vehicle belonged to Grove. Schad told police that he had obtained the Cadillac four weeks before in Norfolk, Virginia, after meeting "an elderly gentleman who was with a young girl" and who asked Schad to trade vehicles temporarily so that he and the girl would not be recognized. Schad also told the Utah police that he "was supposed to leave [the Cadillac] at the New York City port of entry at a later date for the man to pick up." Police found in the Cadillac's trunk a set of Utah license plates issued to Ehrhardt. Schad had previously installed these plates on the stolen Ford. He left the Cadillac's original plates on the car while he was driving it across the country.

After Schad's arrest, Ehrhardt went to the Salt Lake City jail and retrieved Schad's wallet. Duncan

then searched the wallet and found the credit card receipts and the New York traffic citation. He again contacted the Salt Lake City police. When Detective Halterman came to Ehrhardt's home to collect the wallet and the documents, Ehrhardt also handed over a diamond ring she said her daughter had found in the glove compartment of the Cadillac. Witnesses later identified the ring as belonging to Grove. Duncan also visited Schad in jail. Duncan testified that during the visit Schad talked about lying about his presence in Arizona at the time of the crime and destroying evidence of the crime.

On October 5, 1979, the jury found Schad guilty of first-degree murder, and the court sentenced Schad to death. The Arizona Supreme Court affirmed the conviction and death sentence. *State v. Schad*, 129 Ariz. 557, 633 P.2d 366, 383 (Ariz. 1981). The United States Supreme Court denied Schad's petition for certiorari. *Schad v. Arizona*, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982). Schad then petitioned for habeas relief in the state courts and obtained a reversal of his conviction on the ground that the trial court improperly instructed the jury on the elements of felony murder. *State v. Schad*, 691 P.2d 710, 711-12 (Ariz. 1984).

In Schad's 1985 retrial, he was again convicted of first-degree murder on materially the same evidence, and sentenced to death. The Arizona Supreme Court again affirmed on direct appeal. *State v. Schad*, 788 P.2d 1162, 1174 (Ariz. 1989). The United States Supreme Court granted certiorari to resolve two questions: (1) whether a first-degree murder conviction

is unconstitutional when it does not require the jury to agree on whether the murder was premeditated murder or felony murder; and (2) whether capital defendants are entitled to jury instructions on all lesser included offenses. *Schad v. Arizona*, 501 U.S. 624 (1991). The Court answered both questions in the negative and affirmed the conviction and sentence. *Id.*

Schad again sought collateral review in state court. The trial court denied the state habeas petition after four years in which Schad's counsel sought repeated extensions to file his supplemental petition detailing his claims, particularly with respect to mitigating sentencing evidence. The Arizona Supreme Court denied review.

Schad filed his federal habeas petition in the District of Arizona in August 1998, raising nearly thirty claims. In a published opinion dated September 28, 2006, the district court denied habeas relief. *Schad v. Schriro*, 454 F.Supp.2d 897 (D. Ariz. 2006). With respect to the challenges to the conviction, the court ruled that the state's failure to disclose impeachment material had not resulted in prejudice, that counsel was not ineffective at the guilt phase, and that the evidence was sufficient to support the conviction. With respect to sentencing, the court denied Schad's request for an evidentiary hearing to present new mitigating evidence in support of his claim of ineffective assistance at the penalty phase, finding that Schad was not entitled to a hearing because he was not diligent in developing the evidence in question during state habeas proceedings. *Id.* at 955-56. The district court also said that the evidence presented in district

court did not render trial counsel's performance deficient because the evidence did not support the strategy of presenting the positive image that trial counsel had pursued at trial. *Id.* at 941-44. This appeal followed.

## III. The Three Challenges to the Conviction

### A. State's failure to disclose exculpatory material

[1] John Duncan, a principal witness for the state, had a lengthy criminal history. As part of its efforts to gain his cooperation in the first trial, in 1979, the prosecution promised to assist Duncan with a pending, unrelated California criminal proceeding. In impeaching Duncan's credibility, the defense was able to question him at length about his criminal record and the prosecution's promises of assistance, but the defense did not know that a prosecutor and detective in 1979 had actually written letters on Duncan's behalf to California authorities. Schad's most significant challenge to his conviction is the prosecution's failure to disclose these letters as impeachment material. Schad asserts that the state's actions violated his due process rights as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959).

The state has conceded that it should have disclosed the letters under *Brady*, so the *Brady* issue is whether Schad was prejudiced by the omission. We agree with the district court that the omission does not justify habeas relief because it resulted in little or no

prejudice, given the extensive impeachment material already available to the defense.

Duncan eventually testified in both trials that while Schad was being detained prior to trial in 1979, Duncan visited him to talk about the theft of the Cadillac, and Schad made several incriminating statements: he asked Duncan to destroy Grove's credit cards, and said that he "would deny being in any area of Arizona or the state of Arizona, particularly Tempe, Arizona and Prescott, Arizona."

In order to obtain Duncan's testimony and assistance with the Schad investigation, an investigative officer, Detective Halterman, had told Duncan he would write a letter to the judge presiding over Duncan's pending California criminal case. Moreover, the day before Duncan was set to testify at Schad's first trial in 1979, the prosecutor at that trial wrote to the California Community Release Board, stating that Duncan was "an extremely important witness for the State of Arizona" who had been "very cooperative" and "deserve [d] any consideration that can be given, including an early release, if possible." The prosecutor wrote a similar letter a few weeks later to the California judge presiding over Duncan's prosecution, stating that Duncan was "an important witness who was of material assistance to the prosecution" in Schad's case, and requesting that Duncan's "sentence be reviewed and if possible, his sentence be modified in light of his contribution to criminal justice."

Before the second trial in 1985, defense counsel unsuccessfully moved to suppress Duncan's testimony. Duncan testified at that trial that Detective Halterman promised to write a letter on his behalf, but stated he did not know whether Halterman actually sent one. Halterman testified that he did offer to write a letter on Duncan's behalf, but stated he did not remember whether he actually sent a letter. Duncan further testified that he did not ask the prosecutor in Schad's first trial for any special treatment, although he did tell the prosecutor he knew of "people in the state prison that have been released early due to the fact of a state prisoner being a witness in a major or semi major crime." Duncan stated that he did not receive early release or any other lenient treatment in exchange for his testimony at Schad's first trial. At the close of the second trial, the prosecution still had not disclosed the letters so the defense could use them to impeach Duncan.

The defense was, however, able to impeach Duncan's credibility with other evidence of his lengthy criminal history, including the fact that he was currently serving a sentence for theft. Duncan admitted the advantages he asked for and some he obtained in exchange for his involvement in the Schad investigation. Detective Halterman stated on cross that although he could not remember whether he sent a letter to California authorities on Duncan's behalf, he recalled promising to do so, and "probably" did send a letter, further impeaching Duncan's credibility. Through this impeachment, the defense established Duncan had a motivation to testify falsely. The letters themselves would have provided some documentation

of his motivation, but would not have provided a new or further motivation.

It is not now disputed that the letters could have been used to impeach Duncan. The prosecution's duty to disclose material, potentially exculpatory evidence-including impeachment evidence-to a criminal defendant was established in *Brady*, 373 U.S. at 86. The state violates its obligations under *Brady*, and denies a criminal defendant due process of law, where the following three elements are met: (1) the evidence in question was favorable to the defendant, meaning that it had either exculpatory or impeachment value; (2) the state "willfully or inadvertently" suppressed the evidence; and (3) the defendant was prejudiced by the suppression. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

The sole dispute here concerns the question of prejudice. The state's failure to disclose the letters written on Duncan's behalf was prejudicial to Schad if "there [was] a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citation omitted).

[2] We conclude the state's admitted failure to turn over the letters was not prejudicial. In the first place, the letters provided no independent basis for impeaching Duncan. We are less likely to find the withholding of impeachment material prejudicial in cases in which the undisclosed materials would not have provided the defense with a new and different form of impeachment. In *Barker v. Fleming*, 423 F.3d

1085 (9th Cir. 2005), for example, we held that the prosecution's failure to disclose evidence of a witness's four prior convictions was not prejudicial because the undisclosed evidence was duplicative of impeachment already pursued at trial. We explained that the evidence would not have "provide[d] 'the defense with a new and different ground of impeachment.' " *Id.* at 1097 (quoting *Silva v. Brown*, 416 F.3d 980, 989 (9th Cir. 2005)).

We have also applied that test to grant relief where the undisclosed evidence would have provided a new basis for impeachment. In *Horton v. Mayle*, 408 F.3d 570 (9th Cir. 2005), we held that the prosecution's failure to disclose an immunity deal with its key witness did prejudice the defendant, where the impeachment pursued at trial went to the witness's criminal history and participation as a getaway driver in the defendant's offense. The undisclosed *Brady* information was that the key witness had received immunity for his testimony; this provided an independent motive for the witness to lie and would have made his critical, uncontroverted testimony less credible. *Id.* at 580. We held that the undisclosed promise of immunity was material, and therefore prejudicial, because it constituted "a wholly different kind of impeachment evidence" from the lines of impeachment pursued by the defense at trial. *Id.*

[3] This case is like *Barker*, where the undisclosed evidence related to the same motives to lie as evidence already known to and utilized by the defense. Here the jury knew that the prospect of obtaining assistance with the California case provided

an incentive to lie. Moreover, Duncan was also impeached by his extensive criminal record, apart from the California case.

In addition, in this case each of the three letters was written in connection with Duncan's assistance at Schad's first trial in 1979, so that the letters would have shed little light on Duncan's motivation to testify at the second trial six years later. Duncan had already enjoyed any benefit the letters prompted, and did not receive any further assistance for his testimony in 1985.

[4] Finally, and most important, the circumstantial evidence demonstrating Schad's guilt was powerful, and Schad did not offer any significant evidence to rebut the strong inference of guilt arising from that evidence. In light of the evidence against Schad, any additional impeachment value of the letters would not have changed the jury's verdict.

[5] Schad is not entitled to relief on his *Brady* claim because of the lack of prejudice resulting from the prosecution's failure to produce the actual letters written pursuant to a promise of assistance to Duncan that, along with the history of Duncan's other transgressions, was fully known to the defense.

In a related argument, Schad asserts that the state committed prosecutorial misconduct by permitting Duncan to testify falsely in 1985 that he did not receive any assistance from the state in exchange for his cooperation. Schad relies on *Napue*, 360 U.S. at 269, in which the Supreme Court held that the state

violated a defendant's right to due process by doing nothing to correct a witness's false testimony that he received no promise of consideration from the prosecutor in exchange for his cooperation.

To prevail on a *Napue* claim, a habeas petitioner must show that "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003). Under *Napue*, false testimony is material, and therefore prejudicial, if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (citation omitted); *see also id.* at 978 ("[I]f it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic.") (internal quotation marks and citation omitted).

[6] In this case, it is not entirely clear that Duncan lied. Although there is some indication in the record that Duncan may at some point have learned that Detective Halterman wrote a letter on his behalf, because the letter was referred to during a California proceeding in Duncan's case, it is not clear that Duncan remembered this letter in 1985 and thus lied on the stand. Even assuming he did, there is no evidence that the state knew or should have known that his testimony was false. Finally, the record before us does not reflect that the California authorities acted on Halterman's and the prosecutor's requests to benefit Duncan. Duncan's testimony that he received no

assistance in his California case was not necessarily false even if he knew and remembered the letter.

### B. Ineffective assistance of counsel at the guilt phase

Schad argues that his trial counsel's failure to locate and present impeachment*1038 testimony from Duncan's ex-wife, Sharon Sprayberry, amounted to ineffective assistance of counsel. Schad contends Sprayberry's testimony would have impeached Duncan's statements about his jailhouse conversation with Schad in which, according to Duncan, Schad made statements about the need to destroy incriminating evidence and stated he would deny being in the area of Arizona where the murder took place. In an affidavit submitted with Schad's state habeas petition, Sprayberry attested that she was present during the conversation and that Schad "did not make any statements relating to a homicide in Arizona."

Ineffective assistance of counsel claims require a defendant to show that counsel's performance was so deficient that it "fell below an objective standard of reasonableness," and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

[7] Regardless of whether Sprayberry may have provided evidence helpful to Schad's case, Schad does not attempt to establish counsel's performance was deficient. In his briefing on appeal, Schad concedes

that defense counsel's efforts to locate Sprayberry were "diligent and thorough." *Strickland* requires both deficient performance and prejudice to make out an ineffective assistance of counsel claim. *See id.* at 687. Schad's inability to show his counsel's efforts to obtain the evidence were deficient is fatal to his claim.

### C. Sufficiency of the evidence

Schad's final conviction-related claim challenges the sufficiency of the evidence underlying his conviction for first-degree murder. In reviewing a sufficiency of the evidence challenge, we ask whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (original emphasis). Because the state habeas court did not address the merits of this claim, we review de novo whether sufficient evidence exists to support Schad's murder conviction. *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir.2002).

[8] Circumstantial evidence and reasonable inferences drawn from it may properly form the basis of a conviction. *United States v. Jackson*, 72 F.3d 1370, 1381 (9th Cir. 1995). The circumstances of Grove's death, including the fact that the murder was accomplished by ligature strangulation, permitted the jury to infer that the killing was intentional and premeditated, as required under Arizona law. *See* Ariz. Rev. Stat. § 13-1105(A). Thus, the main issue at trial was the identity of Grove's killer. To establish that Schad murdered Grove, the state introduced evidence

that one day after Grove was last seen alive, Schad was in possession of Grove's property, including his vehicle, credit cards, and checkbook. Schad's description to New York authorities of Grove as an elderly man strengthened the inference that Schad had encountered Grove in person. Moreover, the state introduced evidence that would permit a rational jury to infer that Schad knew about Grove's death, including Schad's statement to Duncan that he would deny being near the scene of the crime, and request to Duncan to destroy Grove's credit cards. The evidence, taken as a whole, was sufficient to allow a rational jury to return a conviction for first-degree murder, and we therefore deny relief on this claim.

## IV. Sentencing Claims

### A. Introduction — The 1985 Sentencing Proceeding

Prior to the sentencing hearing before the trial court in 1985, Schad's counsel filed a 39-page sentencing memorandum that presented the following mitigating circumstances, which focused largely on his prison conduct following his original conviction in 1979: (1) Schad was a model prisoner; (2) Schad pursued higher education while in prison; (3) Schad had numerous stable friendships; (4) the trial court gave a felony-murder instruction at Schad's trial, meaning that Schad's conduct may have been less reprehensible than a premeditated murder; (5) Schad had a troubled childhood with abusive parents; (6) Schad was beaten and threatened while in prison in Utah for a prior conviction; (7) Schad showed potential

for rehabilitation; (8) Schad had a stable character; (9) Schad did not pose a risk of violent or dangerous behavior; (10) Schad made charitable contributions; (11) Schad did not drink or use drugs; and (12) Schad had an excellent employment record in Arizona prisons.

At the sentencing hearing, Shaw called fifteen witnesses, including correctional officers, friends, relatives and a psychiatrist. Nearly all of the testimony related to Schad's good reputation and behavior as an adult, and particularly his good behavior while in prison. A Utah prison official, John Powers, testified regarding Schad's personal development and conduct while he was incarcerated in Utah state prison after a prior offense. Powers stated that Schad "made some great strides" in the prison's group therapy program. He also testified that Schad was permitted to be near weapons while working on a renovation project because he "was an excellent security risk." Powers testified that, in general, Schad was a "model prisoner" while incarcerated in Utah, and that he recommended Schad's release because he felt Schad was not a danger to the community. One Arizona prison official, Frank Terry, testified that Schad was placed in a relatively low security prison block because he posed no disciplinary problems or security risks, and another official, Jerry McKeand, elaborated that Schad actually assisted with other prisoners' disciplinary issues by helping to "keep[ ] the cell block kind of in line."

Next, several of Schad's friends and relatives testified. Janet Bramwell, a friend and fellow member of Schad's church, the King of Glory Lutheran Church

in Tempe, testified that Schad requested and received instruction in the Lutheran faith while in prison, and was confirmed as a member of the church. Bramwell also testified that she, her husband, and other church members wrote letters to Schad, welcoming him into the congregation and telling him about themselves and their families. Bramwell stated that after she and her husband received a letter in return, they began visiting Schad in prison approximately once per month. Bramwell described Schad as "clean and well-groomed," "likeable," and a "very intelligent person, very talented," and stated that Schad opened up to her and her husband about his difficult childhood. Bramwell's husband, Frank Bramwell, confirmed her testimony and also described Schad's educational efforts while incarcerated, including earning such good grades in his college courses that he was named to the dean's list. Another friend and fellow church member, Herb Zerbst, testified regarding his friendship with Schad. Zerbst and his wife corresponded with Schad using both written letters and audio cassettes on which they recorded messages. Zerbst and his wife also visited Schad in prison until they moved to Illinois. Zerbst described Schad as friendly and caring, and described Schad's concern for the Zerbsts' safety during their long drive to Illinois. Zerbst also stated that Schad was creative and sent him and his wife gifts, including crocheted items and paintings.

Ronald Koplitz, the chaplain at Schad's prison, stated that Schad consulted him for religious guidance due to his fear of death. He testified that Schad stood out from other prisoners because he was likeable and genuine. Koplitz described Schad as "the kind of

inmate you can like, and the kind of inmate that does not play games or try to .... get extra favors by being in a religious program." He testified that despite Schad's troubled childhood, he believed Schad had a "stable personality," at least in a controlled prison setting.

The psychiatrist, Otto Bendheim, testified briefly regarding Schad's early background and mental condition. Bendheim stated that Schad "had a miserable childhood and ha[d] been delinquent since his teens" and that he "was a deprived youngster," but that despite his criminal history, Schad was "not a dangerous type," was "pleasant" and had "above average" intelligence, and Bendheim was not "a bit afraid for his own safety" when he met with Schad.

The pre-sentence report prepared by a probation officer included discussions of Schad's troubled childhood, favorable character reports from several of Schad's friends and Arizona prison officials, and Schad's good behavior and achievements in prison. The report described Schad's childhood as follows:

> The defendant reported a very stormy childhood, with his father being an alcoholic and abusing the defendant on a regular basis. The defendant stated that his father would beat him with his fist as discipline. The defendant reported that he tried to protect the family from his father's abuse by allowing his father to inflict beatings on him for anger towards other members of the family. The defendant always kept his problems to himself and to this day has not dealt with the feelings he has regarding his life.

> The defendant learned at an early age how to suppress his feelings, even to the point of refusing to display emotion when his father would abuse him. ... The defendant stated that at age seventeen he tried to commit his father to the VA Hospital for treatment. He stated that his father was out of control due to his alcoholism. When the officials came to pick up his father, the defendant's mother changed her mind and took sides with her husband. The defendant stated that when the officials left he experienced the worst beating of his life. The defendant described his decision to commit his father as the hardest thing he ever did in his life.
>
> The defendant stated that in addition to the abuse his father would never allow him to socialize with others; consequently, the defendant was a very shy, withdrawn adolescent.

At the sentencing hearing, defense counsel praised the presentence report's discussion, but did not present additional evidence regarding Schad's troubled childhood. Counsel did not, for example, present testimony or affidavits from Schad's relatives to provide first-hand descriptions of the abuse Schad suffered as a child, nor did counsel seek a comprehensive psychiatric evaluation to assess the negative effects of that abuse.

After the sentencing hearing, the court rendered a special verdict discussing the aggravating and mitigating factors. First, the court took into account Schad's positive record since his arrest and incarceration. The court found that the most persuasive mitigating circumstance was the fact that Schad was "a model prisoner, a student and a religious man with many supportive friends since being incarcerated." The court observed that Schad was "helpful, charitable and appears to care for people," that he did not abuse drugs or alcohol or have any discipline problems, and that he took many college courses while in prison and earned good grades. The court said, however, that although Schad's "good, stable character" and "signs of rehabilitation" constituted a mitigating factor, this factor was "not particularly weighty of view of [Schad's] length of incarceration."

Next, the court noted Schad's "unfortunate childhood," but concluded it was not a "persuasive mitigating circumstance." The sentencing court determined that the mitigating circumstances presented by Shaw were insufficient "to overcome any one of the aggravating circumstances," and imposed a sentence of death. After conducting an independent review of the aggravating and mitigating evidence, the Arizona Supreme Court affirmed, concluding that the mitigating factors were "insufficient to outweigh a single aggravating factor." *Schad*, 788 P.2d at 1174.

The aggravating factors applied by the sentencing court related to a prior conviction and to the circumstances of the murder. The court relied on a

1968 Utah second-degree murder conviction to impose aggravating factors for having a prior conviction punishable under Arizona law by a life sentence or by death, and for having a prior conviction of a crime of violence. The court also found that Grove's murder was committed for the purpose of pecuniary gain. On appeal, the Arizona Supreme Court affirmed the first and third of these aggravating factors, and declined to reach the issue of whether the violent crime aggravator was sufficient to support imposition of the death penalty. *Id.* at 1170.

### B. The Protracted State Court Post-Conviction Proceedings

After Schad was sentenced to death, he initiated state post-conviction proceedings in 1991 in which he was represented by a new attorney. In Schad's preliminary state habeas petition, filed on December 16, 1991, he argued the sentencing court failed to give proper weight to mitigating evidence of his troubled family background, but he did not raise a claim of ineffective assistance of counsel. The state court ordered Schad to file a supplemental petition by February 18, 1992, and Schad's legal team requested and obtained seventeen successive extensions of that deadline. During that time, post-conviction counsel obtained appointment of an investigator to look into Schad's family history.

In January 1994, Schad was appointed a new post-conviction attorney. The court granted her request for further investigative services, as well as more than ten motions for an extension of the deadline to file

Schad's supplemental state habeas petition. In March 1995, counsel obtained appointment of a mitigation expert. The court denied counsel's request for disclosure of Schad's prison file and for contact visits to allow the mitigation expert to interview Schad.

After the court ruled that no additional extensions of time would be granted, counsel filed Schad's supplemental petition on October 19, 1995. The supplemental petition included a general claim that Schad's sentencing counsel was ineffective for failing to discover and present mitigating evidence regarding Schad's family background. Attached to the supplemental petition was an affidavit from the expert in which she stated that the presentence report used at Schad's sentencing hearing did not adequately address the extent of the abuse Schad had suffered as a child. The affidavit described the physical and psychological abuse inflicted by Schad's father, including beating Schad with a belt or fists, refusing to allow Schad's mother to show him any affection, and isolating Schad from other children. The expert recommended that a comprehensive psychological evaluation be performed, and stated that she could compile a thorough profile only through further interviews with Schad and his relatives.

The state habeas court denied the ineffective assistance claim in June 1996 without holding an evidentiary hearing. The court described Schad's request for a hearing as amounting to nothing more than a "fishing expedition." Schad filed a motion for rehearing along with another expert affidavit. That affidavit indicated that she had performed additional

interviews with Schad and obtained more information about his life history, but did not describe the new information or include any supporting affidavits or other documents. The trial court denied the motion for rehearing, and in 1997 the Arizona Supreme Court denied Schad's petition for review.

### C. Federal Habeas Proceedings

By the start of federal habeas proceedings in 1998, Schad's counsel had obtained a great deal more information about his early and abusive childhood experiences. Schad asserted that he received ineffective assistance of counsel at the penalty phase of trial when his attorney, Shaw, failed to investigate and present mitigating evidence regarding Schad's troubled childhood, and instead relied on the brief discussion of Schad's childhood contained in the psychiatrist's testimony and in the presentence report. During proceedings before the district court, Schad sought an evidentiary hearing in order to present a significant amount of evidence regarding his abusive childhood, which he contends his sentencing counsel should have presented at the sentencing hearing.

The district court held that Schad was not entitled to an evidentiary hearing because he was not diligent in attempting to develop the evidence during his state habeas proceedings. The court denied Schad's ineffective assistance claim without holding an evidentiary hearing. For the following reasons, we conclude that the district court applied the wrong standard in ruling on the issue of Schad's diligence, and remand for the court to determine, using the

correct standard, whether an evidentiary hearing is warranted on the merits of the ineffective assistance claim.

Schad sought to present mitigating evidence not submitted during sentencing or during his state post-conviction proceedings, including extensive mental health records of his mother, father, and brother, as well as several declarations discussing Schad's childhood and its effect on his mental health. The first declaration, from psychologist Charles Sanislow, provided an extremely detailed discussion of the psychological impact of Schad's abusive childhood. The second declaration, from psychologist Leslie Lebowitz, discussed the mental health history of Schad's parents, including his mother's struggle with prescription drug addiction and his father's affliction with post-traumatic stress disorder due to spending eighteen months in a German POW camp during World War II. Declarations from Schad's mother and aunt provided details regarding Schad's father's severe alcoholism and the abuse he inflicted upon his family. The final declaration, from a paralegal employed by the office of the Federal Public Defender, described interviews with Schad's sister and aunt regarding Schad's childhood.

The district court held, however, that Schad was not entitled to expansion of the record or to an evidentiary hearing because he was not diligent in developing the proffered evidence in state court. The district court also held that even if the evidence were considered in federal court, the evidence did not show that sentencing counsel was deficient in failing to present it. The court ruled the strategy counsel

pursued was competent and that the newly proffered evidence could not have affected the result.

D. Schad's Claims

1. Diligence

[9] The fundamental issue presented in this habeas proceeding is whether Schad was diligent in seeking to present in state collateral proceedings the extensive mitigating evidence offered in district court. Under 28 U.S.C. § 2254, the district court shall not hold an evidentiary hearing to consider new evidence if the petitioner has "failed to develop" the factual basis of the claim in state court, unless the claim relies on an intervening change in constitutional law or a factual predicate that could not previously have been discovered, and the evidence the petitioner seeks to present would establish by clear and convincing evidence the petitioner's entitlement to habeas relief. 28 U.S.C. § 2254(e)(2). A petitioner has "failed" to develop a claim where there was a lack of diligence or some other fault on the part of the petitioner or his counsel. *Williams v. Taylor*, 529 U.S. 420, 432 (2000). In this context, diligence requires a habeas petitioner to have made a "reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* at 436. If a petitioner fails to discover the facts necessary to support his claim despite making a reasonable effort to investigate those facts, he will not be barred from introducing new evidence in federal court. *Id.* at 435 ("Diligence ... does not depend ... upon whether [investigative] efforts could have been successful.").

The record before us reflects that Schad's legal team attempted in state court to develop a factual basis for his ineffective assistance claim, but faced several difficult obstacles. Schad's family members were not cooperative and counsel had difficulty accessing records generated during a decade of prior proceedings in Schad's case. This resulted in three changes in counsel. The mitigation expert was not appointed until 1995, and although her affidavits after her appointment explained that she needed additional time for investigation due to the vast size of Schad's records and the reticence of Schad's family members, the state habeas court set the deadline for filing the supplemental state habeas petition at a date three months after her appointment. As a result, Schad was unsuccessful in bringing out any significant mitigation evidence during his state habeas proceedings, leading to the denial of his ineffective assistance of sentencing counsel claim without an evidentiary hearing in state court.

The district court, however, focused not on the reasonableness of Schad's efforts in state court to develop mitigating evidence regarding his childhood, but on the fact that he did not succeed in doing so. The court emphasized that Schad failed to present the evidence to the state post-conviction court despite having several years to do so as well as having a court-appointed investigator. The court held: "[T]he record demonstrates that the state court facilitated Petitioner's investigation and development of evidence supporting his claims." *Schad*, 454 F.Supp.2d at 955. The district court further stated, "The state court's

refusal to hold an evidentiary hearing was attributable to Petitioner's failure to develop the factual record." *Id.* at 955-56. The district court thus did not fully consider the materials presented to it because it ruled that Schad had not been diligent in attempting to develop the basis of his claim during his state post-conviction proceedings. The district court's focus on Schad's failure to develop a record in state court, rather than on whether he was delinquent in attempting to do so, was not in accord with controlling Supreme Court precedent. *See Williams*, 529 U.S. at 435 ("Diligence for purposes of [28 U.S.C. § 2254(e)(2)] depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend ... upon whether those efforts could have been successful.").

[11] In the district court, Schad presented evidence that, we conclude, if it had been presented to the sentencing court, would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating factors present in the case. The evidence showed how Schad's childhood abuse affected his mental condition as an adult. Had the sentencing court seen this evidence, which was so much more powerful than the cursory discussion of Schad's childhood contained in Bendheim's testimony and the presentence report, it might well have been influenced to impose a more lenient sentence. There was ample evidence presented at sentencing to illustrate Schad's intelligence, good character, many stable friendships, and church involvement, at least while he was in prison. Although

Schad had a prior Utah conviction for second-degree murder, that charge arose out of an accidental death. The missing link was what in his past could have prompted him to commit this aberrant violent act of intentionally killing Grove. Without this psychological link, the crime appeared to be nothing but the act of a ruthless and cold blooded killer in the course of a robbery, and Schad was therefore sentenced to death. The extensive evidence of repressed childhood violent experiences could have supplied that link and mitigated his culpability for the crime.

The record is clear that Schad did not succeed in bringing out relevant mitigating evidence during state habeas proceedings. Because the district court focused on this lack of success, it did not determine the reasonableness of Schad's efforts to develop a record in state court. Neither the state court nor the district court record, however, contains information sufficient for us to determine whether or not those efforts were reasonable and whether Schad therefore acted diligently.

[12] We therefore remand for further proceedings to determine whether Schad was diligent in attempting to develop the state court record. The court should apply the proper standard as to the reasonableness of his efforts. In ordering a remand, we recognize the district court stated it had considered the new evidence proffered by Schad in support of his ineffective assistance of sentencing counsel claim and said that, even assuming diligence, this new evidence could not justify relief. We disagree with that ruling. Thus, should the district court, upon its further

inquiry, find that Schad's efforts to develop the record in state court were reasonable, the district court should hold an evidentiary hearing on the merits of his ineffective assistance of sentencing counsel claim, because the evidence Schad presented to the district court was stronger than the evidence presented at sentencing. Alternatively, in the event the district court determines an evidentiary hearing on diligence is appropriate, the district court could hold a single evidentiary hearing at which it receives evidence concerning both diligence and the merits. If it reaches the merits, the district court should take into account the Supreme Court's recent decisions in *Porter v. McCollum*, 558 U.S. ___, 130 S.Ct. 447 (2009), and *Wong v. Belmontes*, 558 U.S. ___, 130 S.Ct. 383 (2009).

### 2. State courts' consideration of mitigating evidence

Schad not only seeks to rely on mitigating evidence not presented at trial, but also challenges the standard under which the state courts evaluated the mitigating evidence that was submitted. While he makes a strong argument that the state court was following the wrong standard in other cases, we cannot conclude that the state court actually applied a standard that was too narrow in this case.

Because the state habeas court denied this claim without addressing the merits, we review de novo whether the state courts violated Schad's constitutional rights by failing to consider and give effect to the mitigating evidence of Schad's childhood. *Pirtle*, 313 F.3d at 1167.

We begin with the Supreme Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). In *Lockett*, a plurality of the Court struck down an Ohio statute requiring mandatory imposition of the death penalty unless certain specified mitigating circumstances applied. 438 U.S. at 607-08. The Court held that a state's statutory scheme for capital sentencing must not preclude the sentencing court from considering any mitigating evidence offered by the defendant. *Id.* at 604.

[13] In *Eddings*, the Court extended *Lockett*, holding that an Oklahoma capital sentencer acted unconstitutionally by refusing to consider evidence of the defendant's abusive childhood. The court ruled that the state court constitutionally erred in holding that only evidence which specifically negated an offense element was relevant for mitigation purposes. 455 U.S. at 108-13. The Court explained that *Lockett*'s holding applies not only to state statutes that prevent a capital sentencing authority from considering all potentially mitigating circumstances, but also to the process by which a sentencing court conducts the sentencing proceedings: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 113-14 (original emphasis).

Schad's principal contention in this case is that the state courts did not consider the evidence of his troubled childhood because they unconstitutionally

required a "nexus" between his childhood abuse and his commission of Grove's murder. Schad contends the state courts applied the same test the Supreme Court rejected in *Tennard v. Dretke*, 542 U.S. 274, 281 (2004).

In *Tennard*, a case involving a defendant's low mental acuity, the Court invalidated a Fifth Circuit test that rendered potential mitigating evidence of a mental condition relevant to a capital sentencing determination only if the defendant presented evidence that "the criminal act was attributable to" the mental condition. In *Smith v. Texas*, 543 U.S. 37, 45 (2004), the Court went further and rejected any "nexus test," explaining that the requirement to prove a "nexus" between mitigating evidence and the charged offense is "a test we never countenanced and now have unequivocally rejected." *Tennard* and *Smith* are retroactively applicable to the Arizona Supreme Court's 1989 decision in this case. *Smith*, 543 U.S. at 45; *see also Graham v. Collins*, 506 U.S. 461, 467 (1993).

Before *Tennard* was decided, Arizona courts recognized a nexus test, similar to that rejected in *Tennard*, to preclude consideration of evidence of childhood abuse unless the abuse bore a causal connection to the crime of conviction. *See, e.g., State v. Djerf*, 959 P.2d 1274, 1289 (1998) In *State v. Wallace*, 773 P.2d 983, 986 (1989), decided eight months before the Arizona Supreme Court's decision in this case, the Arizona Supreme Court said that "a difficult family background, in and of itself, is not a mitigating circumstance." *Id.* at 986.

After *Tennard*, however, the Arizona Supreme Court has clarified that the nexus test affects only the weight of mitigating evidence, not its admissibility. *See State v. Newell*, 132 P.3d 833, 849 (2006) ("We do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence. But the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.") (citing *Tennard*, 542 U.S. at 287). The United States Supreme Court has said that the use of the nexus test in this manner is not unconstitutional because state courts are free to assess the weight to be given to particular mitigating evidence. *Eddings*, 455 U.S. at 114-15.

In two recent published opinions, we granted habeas relief from Arizona murder convictions on the ground that a lower court used an unconstitutional nexus test. *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008); *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007). In *Styers*, we granted relief to a habeas petitioner whose evidence of post-traumatic stress disorder was expressly disregarded by the Arizona courts due to his failure to demonstrate a causal connection between the disorder and the crime. The Arizona Supreme Court had concluded that although evidence of post-traumatic stress disorder "could ..., in an appropriate case, constitute mitigation," it did not constitute mitigation in the instant case because " two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder." *Id.* at 1035 (quoting *State*

*v. Styers*, 177 Ariz. 104, 865 P.2d 765, 777 (1993)). We held that the court's imposition of a nexus requirement was contrary to the clearly established rule set forth in *Eddings*. *Id.*

In *Lambright*, we granted habeas relief after concluding that the district court improperly applied a preclusive nexus test and declined to consider mitigating evidence of the petitioner's post-traumatic stress disorder. We stated that the district court's approach was "fundamentally flawed" and that the court "misapplied" *Tennard* and *Eddings*. 490 F.3d at 1114-15. We explained that the court erred by refusing to consider the majority of Lambright's mitigating evidence solely on the ground that he failed to show a nexus between the mitigating evidence and the crime. *Id.*

[14] In both of those cases, however, it was clear from the record that the lower court had applied the unconstitutional nexus test and had excluded mitigation evidence. By contrast, in this case, there is no indication that the state courts applied a nexus test, either as a method of assessing the weight of the mitigating evidence, or as an unconstitutional screening mechanism to prevent consideration of any evidence. Rather, the record shows that the sentencing court did consider and weigh the value of the small amount of childhood mitigation evidence that was offered, stating that it was not "a persuasive mitigating circumstance in this case." The Arizona Supreme Court stated that it had conducted an independent review of the entire record regarding the aggravating and mitigating factors. *See Schad*, 788

P.2d at 1172. In short, it does not appear that the state courts refused to consider any evidence Schad offered. They concluded, as *Eddings* allows them to do, that it did not outweigh the aggravating circumstances.

[15] Absent a clear indication in the record that the state court applied the wrong standard, we cannot assume the courts violated *Eddings*'s constitutional mandates. *See Bell v. Cone*, 543 U.S. 447, 455 (2005) ("Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation."). We must hold there was no constitutional error in the Arizona courts' consideration of the mitigating evidence of Schad's troubled childhood.

[16] Schad's two remaining contentions with respect to the state courts' consideration of the mitigating evidence are easily disposed of. First, Schad challenges the state courts' weighing of the aggravating and mitigating evidence. It is well-established, however, that state courts have the discretion to assess the appropriate weight of sentencing-related evidence. *See Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer."). It was well within the state courts' discretion to determine that the mitigating evidence presented in Schad's case did not outweigh the aggravating evidence.

[17] Next, Schad challenges the state courts' failure specifically to address each of the categories of

mitigating evidence he presented at his sentencing hearing. State courts imposing or reviewing capital sentences are not required to provide an exhaustive discussion of all the mitigating evidence presented, as long as it is clear from the record that they reviewed the evidence. *See Moormann v. Schriro*, 426 F.3d 1044, 1055 (9th Cir. 2005) ("[T]he trial court need not exhaustively analyze each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant.") (internal quotation marks and citation omitted). Moreover, where, as here, the sentencing court states that it has considered all the mitigating evidence offered, we may not second guess its actions. *See id.* ("This court may not engage in speculation as to whether the trial court actually considered all the mitigating evidence; we must rely on its statement that it did so.").

### 3. State courts' application of aggravating factors

Schad challenges the state courts' determinations regarding the aggravating circumstances present in his case. Most importantly, he challenges the sufficiency of the evidence underlying the pecuniary gain aggravating factor, the only aggravating factor connected to this crime. Schad contends that application of the aggravating factor was improper because there was insufficient evidence to prove robbery was a motive for Grove's murder.

Under Arizona law, "[a] court may find pecuniary gain as an aggravating factor if the

expectation of pecuniary gain is a motive, cause, or impetus for the murder and not merely a result of the murder." *State v. Hyde*, 921 P.2d 655, 683 (Ariz. 1996). In applying the pecuniary gain factor, the sentencing court in this case emphasized that the state had proved that Schad was in possession of Grove's credit cards and his vehicle within a day of the murder and immediately began using the vehicle and the cards, as well as his check book. Grove's vehicle was a new Cadillac, while Schad abandoned his stolen Ford. In affirming the application of the factor, the Arizona Supreme Court held that these facts constituted "strong circumstantial evidence that the purpose of the murder was pecuniary gain." *Schad*, 788 P.2d at 1171. We review this determination under AEDPA standards that require us to give a presumption of correctness to a state court's factual determinations. 28 U.S.C. § 2254(e)(1).

In essence, Schad's position is that without direct evidence of his guilt, no rational sentencer could have made any finding as to his motive. Schad's guilt, however, was established at the guilt phase through circumstantial evidence. There is nothing irrational about relying on circumstantial evidence to show motive. Nor was the application of the pecuniary motive factor arbitrary or capricious. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).

[18] It is clear that the evidence presented at trial regarding Schad's acquisition and use of Grove's vehicle, credit cards and checkbook rationally supported the application of the pecuniary gain aggravating factor. After Grove's death, Schad was

living off of Grove's credit cards and his bank account. Indeed, like the district court, we find it difficult to imagine a non-pecuniary motive for the murder. *See Schad*, 454 F. Supp. 2d at 931 ("[D]espite Petitioner's argument that the evidence could lead to contradictory inferences, it is difficult to ascribe a motivation other than pecuniary gain to the offense against Mr. Grove, who was a complete stranger to Petitioner."). Accordingly, we uphold the validity of pecuniary gain as an aggravating factor.

The state courts concluded that, under state law, a single aggravating factor was sufficient to support imposition of the death penalty in this case. Because we conclude that the pecuniary gain factor was rationally supported by the evidence presented, and not arbitrarily imposed, we do not reach the challenges to other aggravating factors.

## V. Conclusion

We affirm the district court's denial of habeas relief on all claims related to Schad's conviction. With respect to the sentence, we reverse the district court's conclusion that Schad was not entitled to an evidentiary hearing regarding his claim of ineffective assistance of counsel at sentencing. On remand, the court should determine whether there was a "failure" to develop the record in state court under the standard set forth in *Williams*. We remand for the district court to consider, using the proper standard, whether Schad was diligent in pursuing state court relief, and if so, to hold a hearing on the merits of his ineffectiveness claim.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

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RYMER, Circuit Judge, concurring in part and dissenting in part:

While I concur in the rest of the opinion, I part company with the majority's decision to remand for an evidentiary hearing on diligence and, in turn, on the merits of Schad's claim of ineffective assistance of counsel at sentencing.[1]

First, I believe that the district court faithfully construed AEDPA's diligence requirement, properly applied 28 U.S.C. § 2254(e)(2), and correctly determined that during state post-conviction proceedings, Schad did not make "a reasonable attempt, in light of the information available at the time, to investigate and pursue" his claim of ineffective assistance of counsel. *Williams v. Taylor*, 529 U.S. 420, 435 (2000). Schad and his state habeas counsel knew from the presentence report that his childhood was abusive but that details about his family background were not proffered in mitigation at the penalty phase. This information was available at the time. He had nearly four years in state post-conviction proceedings

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[1] I concur in Section III of the per curiam opinion with respect to Schad's challenges to his conviction, and with respect to sentencing, in Sections IV.D.2 (the state courts' consideration of mitigating evidence) and IV.D.3 (the state courts' application of aggravating factors). I dissent only from Section IV.D.1.

to ferret out the affidavits and evidence presented for the first time in federal court. He was never denied a request for funding or help in state court. Instead of trying to try the issue in state court, Schad asked for thirty-four continuances and ended up presenting no facts to that court in support of this claim. Now, with the majority's blessing, Schad is making the federal court sitting in habeas an alternative forum for trying facts and issues which he made insufficient effort to pursue in state proceedings. This is precisely what *Williams* says that federal courts should not become. *Id.* at 437.[2]

Second, I disagree with the majority's view that the district court improperly focused on the success of

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[2] As the Court explained in Williams:

> Comity dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.

529 U.S. at 437 (internal quotes, alterations, and citations omitted)

Schad's state-court efforts, or that the weight of newly developed information has any role in the diligence inquiry. The district court properly focused on the notice, information, time and resources available to Schad, as well as on the causes for delay. *See Schad v. Schriro*, 454 F.Supp.2d 897, 951-53, 955-956 (D. Ariz. 2006). I also disagree that this court should (or may) order an evidentiary hearing on diligence that Schad himself did not ask for, simply because the record seems to two of us to contain information that is inadequate to determine whether Schad's efforts in state court were reasonable. It was Schad's burden to show diligence, and if the record is insufficient to determine that Schad's efforts were reasonable, then it was sufficient to determine they were not reasonable. That is what the district court found, and rightly so.

Finally, in these circumstances § 2254(e)(2) bars an evidentiary hearing on the merits of Schad's ineffective assistance claim. Nevertheless the majority orders one if, on remand, the court determines that Schad was actually diligent. It does so without taking into account the district court's alternative explanation why no hearing is required, without mentioning AEDPA, and without tethering the order to *Strickland*.[3] And I take issue with that.

As Schad did next to nothing in state court to develop the factual predicate of his ineffective assistance of counsel claim, he is barred from obtaining an evidentiary hearing on the merits of that claim in

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

federal court. I would, therefore, affirm across the board.

Schad alleges that his counsel was ineffective at sentencing for failing to investigate Schad's family background and to present corroborating evidence about the nature and effects of his abusive childhood.

In a nutshell, the record shows: Counsel's mitigation case at sentencing emphasized Schad's changed character and potential for rehabilitation. Fourteen people in the Phoenix area who had come to know Schad while he was incarcerated testified that they valued his friendship, good works, and positive contribution to their lives. Counsel also pointed out the emotional harm caused by Schad's abusive childhood with an alcoholic father. For this he relied on the presentence report.[4]

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[4] The presentence report indicated that Schad reported "a very stormy childhood, with his father being an alcoholic and abusing the defendant on a regular basis." Schad's father beat him with his fist and never allowed him to socialize with others. Schad often accepted beatings to protect other members of his family. Schad kept his problems to himself and had yet to deal with the feelings regarding his life. At the age of seventeen, Schad tried to commit his father to the VA Hospital for treatment because his father was out of control due to alcoholism. However, his mother took his father's side and Schad was given the worst beating of his life. Schad left home at eighteen, once he graduated from high school. His father died when Schad was incarcerated on the Utah offense, and his last contact with his mother was in 1978 when she was drinking and he figured it was better not to stay around. Schad hadn't had contact from his siblings since the Arizona murder, but did write them.

Sentence was imposed in 1985 and affirmed on direct appeal in 1989. After a trip to the United States Supreme Court, Schad filed a post-conviction petition in state court on December 16, 1991. John Williams took over as counsel after the petition was filed, and was ordered to file a supplemental petition by February 18, 1992. That deadline was extended five times (February 14, March 18, April 17, August 6, and October 14, 1992). On November 3, 1992 Williams was replaced by Michael Chezem. Chezem successfully sought appointment of an investigator and funds (July 30, 1993), and also obtained twelve extensions (January 5, 1993, February 2, April 14, May 14, June 28, July 30, August 19, September 27, October 25, November 29, December 27, 1993, and February 1, 1994). On January 31, 1994, Chezem withdrew and was succeeded by Rhonda Repp. She obtained authorization for further investigative services in February 1994; on March 28, 1995, she asked for the services of a mitigation expert, which the court approved on July 6, 1995. Meanwhile, she asked for and received a series of extensions on the ground that she and the investigator had not completed their investigation and located all potential witnesses (February 16, 1994, March 18, April 22, May 24, June 23, July 22, August 30, September 27, October 31, November 21, December 28, 1994, January 18, 1995, February 21, April 20, May 22, June 20, July 21, August 22, and September 20, 1995). On September 20, 1995 the court ruled that no further continuances would be granted. A supplemental post-conviction petition was filed on October 19, 1995, together with a request for an evidentiary hearing on the basis of "newly discovered evidence." The newly discovered

evidence consisted of an affidavit by the mitigation expert, Holly Wake, expressing her opinion that the presentence report failed adequately to address the seriousness of Schad's abuse; it contained no new facts and identified no witnesses. The state court denied the ineffectiveness claim in July 1996 for lack of any specifics.

Schad's federal petition was filed December 16, 1997; an amended petition was filed August 3, 1998. The following year Schad presented newly developed information together with a request for an evidentiary hearing on the merits of his ineffectiveness claim.[5] The district court found that Schad knew the factual basis

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[5]The newly developed information submitted in support of Schad's federal ineffective assistance claim includes an affidavit from his mother recounting her experiences with Schad's father; an affidavit from an investigator reciting a conversation with Schad's sister, which describes what it was like to grow up in a poor household with cold and distant parents who showed no affection for their children, and with his aunt, who discussed the religious upbringing of the Schads, Mr. Schad's war experiences, and the death of Schad's infant sister; employment records of Schad's mother (indicating that she was prescribed narcotics for injuries) and Veterans' Administration records of Schad's father (showing that he returned from the war with a disabling anxiety disorder and alcoholism); an affidavit by a clinical psychologist, Dr. Leslie Lebowitz, noting that Schad's family was dysfunctional and the violence and neglect the children experienced left them at a tremendous disadvantage when faced with challenges of adult life; and an affidavit by a clinical psychologist, Dr. Charles Sanislow, who prepared a social history of Schad repeating the family background, and could not rule out the possibility that Schad's history of abuse, neglect, and abandonment played a significant factor in his psychiatric and behavioral functioning as an adult.

for his claims at the time of post-conviction proceedings, and had not shown that the newly developed information was not available during that period. The court rejected Schad's argument that post-conviction counsel were diligent because they asked for time, funds, and a hearing to investigate, develop, and present evidence. As the court explained, post-conviction counsel requested and were granted thirty-four extensions, delaying proceedings for four years, and were provided with funds, an investigator, and a mitigation expert. Likewise, the district court found that reasonable counsel with the time and funding available to postconviction counsel would have presented evidence in support of Schad's position that his family background was not adequately explored by trial counsel. Further, the court found, the state court did not unreasonably deny an evidentiary hearing given that only conclusory claims were made about additional mitigation evidence. Accordingly, because Schad did not " 'undertake[ ] his own diligent search for evidence' in state court," the court held that Schad was not entitled to an evidentiary hearing or to expand the record. *Schad*, 454 F.Supp.2d at 956 (quoting *Williams*, 529 U.S. at 435).

II

New evidence may be introduced on federal habeas "only if respondent was not at fault in failing to develop that evidence in state court, or (if he was at fault) if the conditions prescribed by § 2254(e)(2) were met." *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004)

(citing *Williams*, 529 U.S. at 431-37).[6] This rule applies to requests for evidentiary hearings, and whenever parties seek relief based on new evidence. *Id.* The rule also covers a motion to expand the record under Habeas Rule 7.[7] *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir.2005).[8]

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[6] 28 U.S.C. § 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-
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> (A) the claim relies on-
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> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

[7] Habeas Rule 7 provides, in relevant part: "if the petition is not dismissed, the [habeas court] may direct the parties to expand the record by submitting additional materials relating to the petition."

[8] *Cooper-Smith* indicates that the standard of review is an open question, 397 F.3d at 1241 n. 12, but regardless of whether it is de novo or for abuse of discretion, the district court properly denied Schad's request for an evidentiary hearing and to expand the record because he did not exercise diligence in his efforts to develop the factual basis of his claims in state court.

Schad does not argue that the exceptions permitting a hearing or admission of new evidence under § 2254(e)(2)(A) or (B) apply. Thus the lone issue is whether he failed diligently to develop the factual basis for his claim in state court proceedings.

"Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432, 120 S.Ct. 1479. "Diligence for the purposes of the opening clause depends on whether the prisoner made a reasonable attempt, in light of the information available, to investigate and pursue claims in state court[.]" *Id.* at 435, 120 S.Ct. 1479. "The failure to investigate or develop a claim given knowledge of the information upon which the claim is based, is not the exercise of diligence." *Cooper-Smith*, 397 F.3d at 1241 (citing *Williams*, 529 U.S. at 439-40). The petitioner bears the burden of showing diligence. *See Williams*, 529 U.S. at 440 (concluding that petitioner met the burden of showing he was diligent in efforts to develop the facts supporting certain claims).

The district court applied these principles, and did so correctly in my view. The presentence report disclosed that Schad's childhood was abusive and unstable, that he had siblings, that his father was an out-of-control alcoholic whom Schad had sought to have committed, that Schad was forced to endure beatings and isolation, and that neither parent stood up for him or gave him attention or affection. This put post-conviction counsel on notice that details of Schad's

family background beyond those brought out at sentencing might be mitigating. Notice of the need to develop evidence is an important marker of diligence. In *Williams*, for example, the Court found that the petitioner was not diligent in developing facts in support of a Brady claim in part because the trial transcript put the petitioner's habeas counsel on notice of possible exculpatory evidence, but was diligent in developing juror bias and prosecutorial misconduct claims in part because nothing in the record "would have put a reasonable attorney on notice" of misconduct. 529 U.S. at 437-44. In line with *Williams*, I would conclude (as the district court did) that Schad knew the factual basis for his claims during post-conviction proceedings.

Further, the information newly developed for federal court was available during state court proceedings. Indeed, Schad told the district court that the newly discovered mitigating evidence was "readily" available at the time of sentencing, but wasn't presented due to defense counsel's lack of investigation-and that had counsel only looked, he would have found it.[9] It follows that the newly

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[9] Petitioner's Brief Pursuant to Court's May 8, 2000 Order and Motion for Evidentiary Hearing (filed October 23, 2000). After summarizing the newly developed information, Schad argues that he was prejudiced by sentencing counsel's failure to investigate and discover this evidence, stating: "First, readily available mitigating evidence was not presented due to defense counsel's lack of investigation." *Id.* at 88. Prefacing his summary of the newly discovered evidence, Schad says: "Had counsel only looked, however, he would have found this." *Id.* at 81.

(Continued)

discovered information was readily available to post-conviction counsel as well, but wasn't adduced due to lack of investigation.

Schad had plenty of time (four years) and resources (all he asked for) to pursue the claim he just wasn't persistent. His efforts consisted of one telephone call in 1993 by an investigator to Schad's mother and his request for an evidentiary hearing. In the phone call, Schad's mother said that Edward was a good boy, declined to say where his siblings were, and hung up. She was apparently reluctant or afraid to talk about her son over the phone with someone she didn't know,[10] which is perfectly understandable. However, there was no follow-up. Schad also asked for an evidentiary hearing in state court, which, if well-founded, might show diligence-but it doesn't here because he offered no facts and identified no witnesses in support. *Cf. Williams*, 529 U.S. at 437 (noting that "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law."). So far as the record reveals, that's it for effort.

There is no evidence that the state impeded those efforts. Schad's requests for professional

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I mention this not to suggest that the facts could have been discovered, but to indicate that the information sought was available at the time. *See Williams*, 529 U.S. at 435

[10] *See* Petitioner's Reply to Respondents' Brief on the Merits (filed June 12, 2001), at 70 (discussing reasonableness of Mrs. Schad's reluctance to talk over the phone with someone assisting her son for the first time in fifteen years).

assistance and funds were granted. All but the last extension he sought for filing a definitive petition in order to investigate, locate witnesses, and review the file were granted.[11]

The majority faults the district court in part because it ruled without "appropriate consideration of the many reasons Schad offered for his inability to produce the mitigating evidence during the state proceedings." Maj. op. at 7871. I disagree: The district court *did* consider the reasons advanced by Schad, but found them wanting — as do I. For instance: Schad argued that the state court did not allow time and a hearing to develop his claims; the district court rejected this excuse given that his counsel asked for, and received, thirty-four extensions, resulting in a delay of four years. 454 F.Supp.2d at 955. Schad also complained about the "chaos" occasioned by being represented by multiple attorneys; the district court rejected this excuse because one counsel alone had twenty-one months (and nineteen extensions) to complete the investigation and file a supplemental petition. *Id.* Schad posited that a denial of funds posed a roadblock; the district court rejected this excuse as Schad was unable to point to any funding request that the state court denied. *Id.* To the contrary, as the district court observed, the record demonstrates that the state court *facilitated* Schad's investigation and

[11] So far as I can tell, the only requests that were denied were for a contact visit with Schad, though post-conviction counsel interviewed him twice; for certain prison records; and for more time after the thirty-fourth extension had expired.

development of evidence by appointing an investigator (who was on the case for more than two years) and a mitigation specialist. Although the mitigation specialist was only appointed three months before the supplemental petition was filed, counsel had been on the case for over a year before she requested such an appointment and, as the district court found, even a year later when the specialist filed her supplemental affidavit (July 7, 1996), she was able to make only conclusory claims about the existence of additional, unspecified mitigation evidence. *Id.* And Schad maintained that the state court denied him an opportunity to develop his claims in an evidentiary hearing; the district court rejected this excuse because the state court's refusal to hold an evidentiary hearing was attributable to Schad's failure to develop a factual record that would have warranted a hearing.[17] *Id.* at 955-56.

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[17]The district court found with respect to the submissions in support of an evidentiary hearing that "[a] reasonable attorney, provided with the time and funding to which post-conviction counsel had access, would have presented affidavits and records in support of the argument that Schad's traumatic family background was not adequately explored by trial counsel." 454 F.Supp.2d at 956. Schad offers no evidence to the contrary. It is manifest from the record that this is so. *See Holland*, 542 U.S. at 652 (stating that "attorney negligence ... is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied").

Rather than acknowledging what the district court actually considered and found, the majority identifies "several difficult obstacles" that *it* believes Schad faced in attempting to develop a factual basis for his ineffective assistance claim in state court that led to his being unsuccessful in bringing out any significant mitigation evidence during his state habeas proceedings. Maj. op. at 7891. These are that Schad's family members weren't cooperative; counsel had difficulty assessing records generated during a decade of prior proceedings; these difficulties somehow "resulted in" three changes in counsel; and the state post-conviction court set a deadline for filing the supplemental petition three months after appointment of the mitigation specialist. However, neither alone nor in combination do these "obstacles" indicate that Schad made a reasonable effort to develop a record in state court in light of available information to which he was timeously alerted.

So far as family cooperation is concerned: The only evidence in the record is that in 1993, Schad's mother unsurprisingly hung up on a phone call by an investigator she didn't know; that she wouldn't tell him where Schad's siblings were; and that even though Schad had written them, his siblings had not responded. So far as appears, no follow-up or attempts to engage other family members were made.[13]

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[13] In her 1999 affidavit filed in federal court, Schad's mother avers that she "would have done anything to help Ed," including going from New York to Arizona to tell the judge all the things she says in her affidavit.

So far as accessing records is concerned: Schad made no showing that he was thwarted in developing in state proceedings the newly developed information produced in federal court such as his mother's medical records, his father's VA records, and evidence that he had to pay his own way around the house and procure alcohol for his father. As the district court noted, the rest of what the mitigation expert later gleaned from Schad's mother, sister, and aunt, is similar to information in the presentence report. Beyond this, Schad failed to link whatever difficulty he may have experienced in getting records from the Arizona prison and those from out of state to his ability to present the claim at issue here — ineffectiveness of sentencing counsel in failing to pursue family background — and none appears. The same applies to records from his first trial.

So far as multiple counsel is concerned: No basis appears for supposing that difficulties in developing a record led to multiple counsel, or vice-versa. In any event, all else aside, Schad's last post-conviction counsel had ample time (more than fifteen months to file the supplemental petition and twenty months before state proceedings were concluded), enough continuances (nineteen), and the assistance of an investigator and mitigation specialist, to develop the claim.

So far as the state court's final deadline is concerned: The district court explained why it was neither unreasonable nor material. Schad had been given more than thirty extensions and four years to get

his act together. He failed to seek appointment of a mitigation expert for more than three and a half years. Even so, a year later the mitigation specialist was still unable to offer anything concrete.

For these reasons, I would hold that Schad did not meet the burden of showing that he was diligent in efforts to develop the factual basis for his ineffective assistance of counsel claim in state court.

## III

The majority's analysis does not persuade me otherwise. The per curiam concludes that the district court applied an incorrect diligence standard-focusing, in its view, on the lack of success rather than the reasonableness of Schad's efforts to develop a record in state court-and remands for an evidentiary hearing under the "proper" standard to determine whether Schad was diligent. Maj. op. at 7893. I do not agree that the district court failed to measure up, or that an evidentiary hearing is needed or appropriate.

In *Williams*, the Commonwealth of Virginia argued that the only question for purposes of the introductory clause of § 2254(e)(2) — the clause that states "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings"— is whether the factual basis was indeed developed in state court. The Court disagreed that this captured the fault concept implicit in the clause, and explained:

> The question is not whether the facts could have been discovered but instead whether the

> prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend, as the Commonwealth would have it, upon whether those efforts could have been successful.

529 U.S. at 435. Thus, the "success" enjoinder simply means that the introductory clause looks at more than the mere fact that a record was not developed in state court. The "more" is diligence.

The district court followed this standard from *Williams* exactly. It focused on whether Schad's attempts to develop the record in state court were reasonable given what he knew, the information available at the time, and the four years plus funding that he requested and got. This applied the correct standard and adopted the right focus. In accord with *Williams*, the district court's conclusion was based on the fact that Schad had notice of the basis for his ineffectiveness claim from the time of sentencing, had nearly four years to develop the record before the state post-conviction court, and pointed to no request of the state court for funding or anything else that was unreasonably denied.

Moreover, this conclusion is consistent with the outcome in *Williams* itself. There, the Court was concerned with three different claims; it found lack of

diligence as to one (a *Brady* claim) but not the others (juror bias and prosecutorial misconduct claims). In the two claims on which the Court found diligence the trial record contained no evidence that would have put a reasonable attorney on notice of the misconduct, thus there was no basis for an investigation; also, counsel requested funding for an investigator, which the state court denied. By contrast, in the claim on which the Court found no diligence, the transcript put state habeas counsel on notice of an undisclosed report's existence and its potential materiality. The only indication that habeas counsel made some effort to investigate the *Brady* material was one letter; no further efforts were made. As the Court said, a diligent attorney would have done more. *Id.* at 439-40. Schad's situation is almost identical. The presentence report put post-conviction counsel on notice of the importance of Schad's family background; one phone call was made to Schad's mother; and no further efforts were made. As the district court said, a reasonable attorney provided with the time and funding to which post-conviction counsel had access would have done more. *Schad v. Schriro*, 454 F.Supp.2d at 956. Consequently, the efforts in Schad's case fall on the not-diligent side of the ledger, just as did the efforts in *Williams* on the *Brady* claim.

In sum, I think the district court got *Williams* precisely right. By the same token, I think the majority's emphasis on "success" misapprehends *Williams*. Also, I think the majority's focus on the strength of the newly developed evidence is itself improper.

Without explaining why, in the middle of its discussion about the "proper" standard for diligence, the majority posits that the newly developed information "would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating factors present in the case." Maj. op. at 7892-93. However, considering the weight of evidence newly developed for federal court is nowhere grounded in § 2254(e)(2) or *Williams*.[14] It seems exactly backward to me. We are not supposed to start with the evidence newly developed for federal court, then determine whether that evidence has "some likelihood" of altering the sentencing court's evaluation, then decide that the petitioner made a threshold showing of reasonably attempting to develop it in state court. Rather, we are to start with diligence — asking whether the factual basis was developed in state court and if not, whether there is lack of diligence or some greater fault attributable to the petitioner — and never get to the weight of the newly developed evidence *unless* the petitioner bears no responsibility for failure to develop and present that evidence in state court. Put differently, evidence that could have been adduced in state post-conviction proceedings *if* the

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[14] To the extent this discussion is intended as a bridge to the merits of Schad's ineffective assistance claim, it is way off the *Strickland* mark. The *Strickland* question is whether there is "a reasonable probability" that absent the errors asserted, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death, 466 U.S. at 695 — not, as the majority puts it, whether there is "at least some likelihood" of altering the sentencing court's evaluation of the aggravating and mitigating factors.

petitioner were diligent, should play no role in a finding that he was diligent. The effect otherwise is to write § 2254(e)(2)'s diligence requirement off the books.

Neither is there basis for requiring an evidentiary hearing *on diligence*. Schad never asked for one. The majority doesn't say that the district court had a *sua sponte* obligation to hold an evidentiary hearing, nor does it cite authority for any such thing, yet *it* orders the hearing *sua sponte*, for which, again, it points to no authority. More importantly, the record is what it is. Schad had the burden of showing he was diligent in his efforts. From the parties' submissions on this point, the district court could determine whether post-conviction counsel were on notice of the need to develop facts relating to Schad's family background and made reasonable efforts to do so in light of the information then available in the time, and with the resources, they had. The district court made that determination, and I think we should review it and affirm. The majority punts because it believes that there is too little information in the record to determine whether post-conviction counsels' efforts were reasonable. Maj. op. at 7892-93. However, lack of evidence of diligence in the state and federal record does not compel an evidentiary hearing, but rather, compels denial of Schad's request for an evidentiary hearing on the merits of his ineffective assistance claim. This is because he had the burden of showing he was diligent, didn't meet it, and § 2254(e)(2) accordingly bars an evidentiary hearing on the merits of his constitutional claim.

## V

Because I would affirm the district court's conclusion that Schad failed to exercise diligence in developing the factual basis of his ineffectiveness claim in state court, I have no need to reach the question whether he is entitled to an evidentiary hearing on that claim given that a hearing is statutorily barred by § 2254(e)(2). However, the majority does reach the issue, directing the district court to hold an evidentiary hearing on the merits of this claim if it finds in the other evidentiary hearing — on diligence — that Schad's efforts to develop the record in state court were reasonable. Maj. op. at 7892-93. I note that it does so without regard to the district court's extensive and reasoned holding in the alternative that, even considering the newly developed information, Schad was nevertheless not entitled to an evidentiary hearing on his ineffectiveness claim.[15] It also does so without regard to the state court's ruling that denied Schad's ineffectiveness claim on the merits. And it does so without reference to AEDPA, *Strickland*, or the double deference owed to state court adjudications under *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009). *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (holding that a court considering a request for an evidentiary hearing "must take into account" the

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[15]The district court concluded that trial counsel presented a strategically sound case in mitigation, and that the newly developed information is not of sufficient weight to create a reasonable probability that, if it had been presented, the trial court would have reached a different sentencing determination. 454 F.Supp.2d at 940-44.

deferential standards of § 2254(d), and a hearing is not required "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief"). In my view, it is inappropriate to order an evidentiary hearing on an ineffective assistance claim without touching these bases.

*Conclusion*

If a state prisoner can show that he indeed tried to develop facts in state post-conviction proceedings in support of an ineffective assistance of counsel claim, then he should be able to proceed in federal court on newly developed evidence because the principles of comity underlying § 2254(e)(2) will not be offended. But those principles will be offended if a state prisoner lets opportunity pass by without giving the state courts that convicted and sentenced him first crack at a claim that his constitutional rights were violated in the process.

Given that Schad had notice during post-conviction proceedings of the need to develop facts about his family background to support his claim of ineffective assistance of sentencing counsel, and the information available at the time, together with the opportunity afforded to develop that information in four years, with thirty-four extensions and with all the funding requested, I agree with the district court that Schad failed to show he was diligent in efforts to investigate and present those facts in state court.

The district court properly applied the governing standard from *Williams v. Taylor*: whether Schad

made "a reasonable attempt, in light of the information available at the time, to investigate and pursue" his constitutional claim. 529 U.S. at 435. Its analysis did not stop with the predicate question whether the factual basis was actually developed in state court. Rather, its focus was on the notice, information, time and resources available to Schad, as well as on the causes for delay. I would not remand for an evidentiary hearing on diligence that was neither requested nor required. As Schad did not develop the factual basis for his ineffective assistance claim in state court proceedings, no evidentiary hearing on the merits of that claim may be held. I would, therefore, affirm.

# APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

| | | |
|---|---|---|
| Edward Harold Schad, | ) | DEATH PENALTY |
| | ) | CASE |
| Petitioner, | ) | |
| v. | ) | CV-97-2577-PHX |
| | ) | ROS |
| Dora Schriro, et al.,[1] | ) | |
| | ) | **MEMORANDUM** |
| Respondents. | ) | **OF DECISION** |
| | ) | **AND ORDER** |
| | ) | |

Petitioner Edward Harold Schad filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. (Dkt.1).[2] The Amended Petition raised twenty-eight claims, including numerous subclaims. (Dkt.27). In an Order dated May 8, 2000, the Court found that Claims C, D, E, F, G, I (in part), K, N (in part), P (in part), T, U (in part), X, Z,

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[1] Dora Schriro, Director of the Department of Corrections, is substituted pursuant to Fed. R. Civ. P. 25(d)(1).

[2] "Dkt." refers to the documents in this Court's file. "M.E." refers to the minute entries of the state court; "ROA-PCR" refers to the state court record of the post-conviction proceedings (CR-96-629-PC); and "RT" refers to the reporter's transcripts of Petitioner's trials. This Court received a certified copy of the state court records from the Arizona Supreme Court. (See Dkt. 38.)

AA (in part), and BB were procedurally barred, and that Claims S, V, W, and Y were meritless. (Dkt.59.) The Court found that Claims A, B, H, I (in part), J, L, M, N (in part), O, P (in part), Q, R, U (in part), and AA (in part) were properly exhausted, and ordered Petitioner to file a memorandum regarding the merits of those claims. (Id.) Petitioner filed a merits brief. (Dkt.82.) Respondents filed an answering brief on the merits (Dkt.91), and Petitioner filed a reply (Dkt.98).

For the reasons set forth herein, the Court concludes that Petitioner is not entitled to habeas relief.

## BACKGROUND

On December 14, 1978, Petitioner was indicted for first-degree murder. (ROA-PCR 2.) The Arizona Supreme Court summarized the facts of the crime as follows:

> On August 9, 1978, a badly decomposed body of an elderly male was found approximately nine miles south of Prescott, Arizona, adjacent to a roadway pull-off on U.S. Highway 89. The body was discovered after a highway department worker had detected the odor of decaying human flesh the previous day while driving past the pull-off. Although the worker and his coworker had stopped briefly to investigate the odor on August 8, the body was not actually discovered until the next day due to the fact that it was well concealed in the brush. After the corpse was discovered, the Yavapai

County Sheriff's Department and the County Medical Examiner observed a small rope tied around the victim's neck. It was later established that the cause of death was strangulation.

Because of the advanced state of decomposition, the body was not identified until October 11, 1978, when it was established that the deceased was Lorimer "Leroy" Grove, a 74-year-old Bisbee resident. Grove had last been seen on August 1, 1978, in Bisbee, Arizona. On that morning, Grove left Bisbee driving a new Cadillac, pulling a camper-trailer. His ultimate destination was Everett, Washington, where he had intended to visit his sister.

On August 3, 1978, a dark green Ford Fairmont was found abandoned 30 miles north of Flagstaff, Arizona, alongside U.S. Highway 89 by a Department of Public Safety Highway Patrolman. It was subsequently determined that the Fairmont had been rented by the defendant from a Ford dealership in Sandy, Utah, on December 31, 1977. Although the vehicle had been rented for the weekend, it was never returned and had been reported as stolen. The vehicle was turned over to the Coconio County Sheriff's Department and was impounded at a local towing yard. On September 12, 1978, two officers examined the vehicle in connection with an investigation of possible homicide charges against defendant. Several items belonging to the victim were

found in the Fairmont, including a mirror device which was identified as being similar to one used by the deceased to hook the trailer to the automobile by himself.

On September 3, 1978, defendant was stopped by a New York Highway Trooper, for speeding, while driving the victim's Cadillac. When the defendant could not produce a registration on the vehicle, the officer asked for an explanation. Defendant replied that it wasn't his car but that he was delivering it for a friend to an area five or ten miles from where the officer stopped him. Asked who was [sic] the friend was, defendant said he was an elderly gentleman by the name of Larry Grove.

Defendant was arrested in Salt Lake City, Utah, on September 8, 1978, for parole violation. Defendant had been on parole from the Utah State Penitentiary where he had been serving a sentence for second degree murder conviction. After defendant was arrested and taken into custody, the Cadillac was taken to the Salt Lake City Police Department impound lot where it was searched. Various personal items were found in the car which were identified as belonging to the victim.

State v. Schad, 129 Ariz. 557, 561-62, 633 P.2d 366, 370-71 (1981) (Schad I ).

On October 5, 1979, a jury found Petitioner guilty of first-degree murder. (ROA-PCR 56). The trial court sentenced Petitioner to death. (M.E.12/27/79). The conviction and sentence were affirmed on direct appeal. Schad I, 129 Ariz. 557, 633 P.2d 366. Petitioner unsuccessfully sought certiorari review in the United States Supreme Court. Schad v. Arizona, 455 U.S. 983 (1982). Pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, Petitioner filed a petition for post-conviction relief ("PCR"), which the trial court denied. Upon petition for review, however, the Arizona Supreme Court reversed the conviction and remanded the case for a new trial. State v. Schad, 142 Ariz. 619, 691 P.2d 710 (1984) (Schad II).

Petitioner was retried, and on June 27, 1985, a jury again convicted him of first-degree murder. (ROA-PCR 196). On August 29, 1985, the trial court sentenced Petitioner to death. (M.E.8/29/85). Petitioner appealed, and the Arizona Supreme Court affirmed his conviction. State v. Schad, 163 Ariz. 411, 423, 788 P.2d 1162, 1174 (1989) (Schad III). Petitioner sought certiorari review in the United States Supreme Court. The Supreme Court granted certiorari and affirmed Petitioner's conviction and sentence.[3] Schad v. Arizona,

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[3] The Court granted certiorari to address two questions, both of which it answered in the negative: "whether a first-degree murder conviction under jury instructions that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder is unconstitutional; and (2) whether the principle recognized in Beck v. Alabama, 447 U.S. 625 (1980), entitles a defendant to instructions on all offenses that are lesser than, and included within, a capital offense as charged." Schad v. Arizona, 501 U.S. 624, 627.

501 U.S. 624, 648 (1991). The Court also denied Petitioner's motion for rehearing. 501 U.S. 1277 (1991).

Petitioner sought post-conviction relief in the trial court by filing both a preliminary petition for post-conviction relief (ROA-PCR 245) and a supplemental statement of grounds for relief (ROA-PCR 319). The court found most of the claims contained in both the preliminary and the supplemental PCR precluded. (M.E.3/27/96.) The court reviewed the merits of the remaining claims and dismissed the petitions. (M.E.6/21/96.) The court also denied Petitioner's motion for rehearing. (M.E.7/24/96.) Petitioner filed a petition for review (ROA-PCR 347), which the Arizona Supreme Court denied without comment.

On December 16, 1997, Petitioner filed a Preliminary Petition for Writ of Habeas Corpus in this Court. (Dkt.1.) He filed his Amended Petition on August 3, 1998. (Dkt.27.)

## LEGAL STANDARD FOR FEDERAL HABEAS RELIEF

Petitioner's claims are governed by the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Lindh v. Murphy, 521 U.S. 320, 336 (1997). For properly preserved claims "adjudicated on the merits" by a state court, the AEDPA established a more rigorous standard for habeas relief. See Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) (Miller-El I). As the Supreme Court has explained, the AEDPA's

"'highly deferential standard for evaluating state-court rulings' ... demands that state-court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam) (quoting Lindh, 521 U.S. at 333 n. 7).

As set forth in 28 U.S.C. § 2254(d), the AEDPA provides two avenues of habeas relief:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"The threshold question under AEDPA is whether [petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." Williams v. Taylor, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review.

"Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. Id. at 365, 120 S.Ct. 1495; see Musladin v. Lamarque, 427 F.3d 653, 655 (9th Cir.2005) ("AEDPA limits the source of clearly-established federal law to Supreme Court cases"); Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. Williams, 529 U.S. at 381. Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be of "persuasive value" in determining what law is clearly established and whether a state court applied that law unreasonably. Musladin, 427 F.3d at 655 (collecting cases); see Clark, 331 F.3d at 1069.

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. Williams, 529 U.S. at 405-06; see Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has observed that "a run-of-the-mill state-court decision applying the correct

legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Id. at 406; see Lambert v. Blodgett, 393 F.3d 943, 974 (9th Cir. 2004).

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ... case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407. In order for a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." Id. at 409, 120 S.Ct. 1495; Visciotti, 537 U.S. at 25.

According to the "demanding but not insatiable" standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. Miller-El v. Dretke, 545 U.S. 231, ___, 125 S.Ct. 2317, 2325 (2005) (Miller-El II). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." Miller-El I, 537 U.S. at 340.

In considering a challenge under 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see Rice v. Collins, 126 S.Ct. 969, 974 (2006); Miller-El II, 545 U.S. at ___, 125 S.Ct. at 2325. However, it is only the state court's factual findings, not its ultimate decision, that are subject to 2254(e)(1)'s presumption of correctness. As the Court noted in Miller-El I, "AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions." 537 U.S. at 341-42.

As the Ninth Circuit has noted, application of the foregoing standards presents difficulties when the state court decided the merits of a claim without providing its rationale. See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002); Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000) (Delgado II). In those circumstances, a federal court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. Himes, 336 F.3d at 853; Pirtle, 313 F.3d at 1167. Although the record is reviewed independently, a federal court nevertheless defers to the state court's ultimate decision. Pirtle, 313 F.3d at 1167 (citing Delgado II, 223 F.3d at 981-82); see also Himes, 336 F.3d at 853. Only when a state court did not decide the merits of a properly raised claim will the claim be

reviewed de novo, because in that circumstance "there is no state court decision on [the] issue to which to accord deference." Pirtle, 313 F.3d at 1167; see also Menendez v. Terhune, 422 F.3d 1012, 1025-26 (9th Cir. 2005); Nulph v. Cook, 333 F.3d 1052, 1056-57 (9th Cir. 2003).

## DISCUSSION

Claim A: **Petitioner's Fifth and Sixth Amendment rights were violated by the prosecution's use of the testimony of John Duncan and by the failure to disclose impeachment material.**

Claim I: **The prosecution's failure to disclose impeachment materials regarding Duncan entitles Petitioner to a new trial.**

In Claim A, Petitioner alleges that prosecution witness John Duncan was acting as *907 a police agent when he obtained incriminating statements from Petitioner. (Dkt. 82 at 7-16.) Therefore, according to Petitioner, the statements he made to Duncan were obtained in violation of his rights under the Sixth and Fourteenth Amendments. (Id.) Petitioner also claims that his Fifth Amendment rights were violated by the State's failure to disclose letters written to California authorities on Duncan's behalf by a Utah detective and the prosecutor at Petitioner's first trial. (Id. at 16-22.) Claim I alleges that the prosecutor's misconduct in

failing to disclose the letters requires a new trial. (Id. at 36-38.)

1. Background.

In September 1978, John Duncan and his wife were temporarily residing with Wilma Ehrhardt, Petitioner's live-in girlfriend, in Sandy, Utah, a suburb of Salt lake City. Petitioner first met Duncan on the night of September 7, 1978, after Petitioner returned to Sandy driving a new 1978 Cadillac. (RT 6/21/85 at 746, 755.) According to Duncan, Petitioner told him that the Cadillac was stolen. (Id. at 818-20, 836.) On the morning of September 8, 1978, Duncan called Salt Lake City Detective Kenneth Halterman with information about the stolen Cadillac.[4] (Id. at 634, 819.) Officers staked out the Cadillac and later that morning arrested Petitioner when he entered the vehicle.[5] (Id. at 624-28.)

Later that day, Ehrhardt went to the jail and retrieved Petitioner's wallet. (Id. at 667, 846.) Duncan observed that the contents of the wallet included credit cards and receipts bearing the name Leroy Groves, as well as a traffic citation issued to Petitioner by a New

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[4] Duncan was familiar with Detective Halterman because Halterman had arrested him on a California fugitive warrant; Duncan had fought extradition and was eventually released by the Utah authorities. (RT 6/21/85 at 821.)

[5] In addition to being suspected of possessing a stolen vehicle, Petitioner was arrested for a parole violation relating to his 1968 conviction for second-degree murder. (RT 8/28/79 at 5.)

York State Trooper. (Id. at 823-24.) Duncan again contacted Detective Halterman and turned over the materials from Petitioner's wallet. (Id. at 640-41, 823.)

On September 9, 1978, Detective John Johnson interviewed Petitioner, who indicated that he came into possession of the Cadillac by swapping vehicles with an elderly man in Virginia. (Id. at 682-83.) Petitioner denied any knowledge of the stolen credit cards found in his wallet. (RT 6/21/85 at 684.) He then invoked his Miranda rights. (See RT 8/28/79 at 47.)

On September 11, 1978, Duncan visited Petitioner in jail. (RT 6/21/85 at 820.) According to Duncan, during their conversation Petitioner urged him to destroy the credit cards and receipts and stated that he would "deny being in any area of Arizona or the State of Arizona, particularly Tempe, Arizona and Prescott, Arizona." (Id. at 825.)

At Petitioner's first trial, defense counsel sought to suppress Petitioner's statement to Duncan. The trial court held an evidentiary hearing and denied the motion. (M.E.9/26/79.) The Arizona Supreme Court rejected Petitioner's argument that admission of the statement violated his Sixth Amendment rights, finding that "[t]he police did not direct Duncan's activities nor did they pay Duncan for the information." Schad I, 129 Ariz. at 565-66, 633 P.2d at 374-75. The court observed that "[a]lthough Duncan wanted 'some help from the police' with regard to his California parole violation, this help did not amount to more than a promise from Detective Halterman that he would write a letter to Duncan's judge in California

relating Duncan's assistance in the investigation" and there "was obviously no 'quid pro quo' for Duncan's assistance." Id. The court further found that "there were no concerted actions on the part of the police aimed at priming Duncan as a witness against defendant at trial, as evidence[d] by the unwillingness of the authorities to deliberately elicit incriminating statements from defendant during the suggested jail visit." Id. The court concluded that, "Regardless of Duncan's motivations in aiding the police, we cannot say that the police 'actively entered into the picture' so as to give rise to an agency relationship." Id.

At Petitioner's second trial, Detective Halterman testified that he did not suggest the visit and that Duncan was not paid for his activities. (RT 6/21/85 at 671-72.) Defense counsel again sought to suppress Petitioner's statement to Duncan, and the court again held an evidentiary hearing. (Id. at 793-816.) Duncan testified that he had initiated contact with Detective Halterman and that the idea to speak with Petitioner was his, not Halterman's. (Id. at 807-11.) Duncan testified, however, that he believed that Halterman or another officer had made special arrangements for the visit to take place. (Id. at 803-04.) He testified that he initially chose to contact Detective Halterman because he had assisted Duncan in obtaining his release after Duncan was arrested pursuant to a fugitive warrant. Duncan also testified that, "at least 10 days after" the jail visit, Detective Halterman offered to write a letter on his behalf to a California judge. (Id. at 812.) Also testifying at the evidentiary hearing was Lieutenant Donald Judd, of the Coconino County Sheriff's Department, who stated that in telephone

conversations with Detective Halterman, Halterman had referred to Duncan as an "informant" or "confidential informant." (Id. at 794-95.) The trial court denied the motion to suppress. In his ruling, the judge rejected the argument that Duncan was actually a confidential informant, observing that, "The Halterman testimony was rather clear, was extremely clear and unequivocal relative to the witness Duncan's not being, term of art, a confidential informant" and that in referring to Duncan as an informant Lieutenant Judd had simply reported the phrase used by Halterman. (Id. at 815.) The judge also noted that Detective Halterman's involvement in Duncan's release occurred "long before the Schad case ever came to light and that the help that, minimal as it was, that he had either offered or perhaps even given to Mr. Duncan, occurred after Duncan, except for testifying, after his information, 10 days after the Schad case was over for Duncan." (Id.) The judge concluded: "It's abundantly clear to the court that Mr. Duncan was not an agent of the police and was not such a person as would be used by the police and such a person as would be required to give Miranda warnings to defendants." (Id. at 815-16.)

On direct appeal, the Arizona Supreme Court was unpersuaded by the "new evidence" presented at the second evidentiary hearing. The court explained:

> Halterman denied suggesting a visit with the defendant. In fact, Duncan testified it was his idea. The record is less clear on who arranged the visit. Duncan stated that he thought that Detective Halterman or someone from the police

> department arranged his visit. Nevertheless, the evidence established that the police did not tell Duncan to visit Schad or what questions he should ask. Furthermore, the homicide investigation had yet to focus on Schad because Detective Halterman did not learn that the owner of the Cadillac was dead until a month after Duncan's visit. Finally, Duncan's release pending extradition*909 was arranged prior to the Schad case coming to light for reasons separate and apart from Duncan's subsequent assistance in this case.
>
> It is unnecessary to review the relevant case law. We do not find the defendant's evidence any more compelling than the last time. The record supports the judge's ruling. We find no error in denying the defendant's motion to suppress.

Id. (citations omitted).

2. **Sixth Amendment violation.**

This Court must determine if, as alleged by Petitioner, the decision of the Arizona Supreme Court was contrary to or involved an unreasonable application of clearly established federal law. As discussed by the Arizona Supreme Court, id. at 414, 788 P.2d at 1165, and acknowledged by the parties, with respect to this aspect of Claim A applicable federal law includes that set forth by the United States Supreme Court in Massiah v. United States, 377 U.S. 201 (1964), and Maine v. Moulton, 474 U.S. 159 (1985), which hold that once a defendant's Sixth Amendment

right to counsel has attached, the government is forbidden from "deliberately eliciting" incriminating statements, and in United States v. Henry, 447 U.S. 264 (1980), which applies the principles of Massiah to information obtained by jailhouse informants.

As Respondents note, also applicable to this claim is the line of Supreme Court cases establishing the principle that the Sixth Amendment "right to counsel attaches only when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing." United States v. Gouveia, 467 U.S. 180, 185 (1984) (citing Kirby v. Illinois, 406 U.S. 682, 688 (1972)); see Illinois v. Perkins, 496 U.S. 292, 299 (1990); Moran v. Burbine, 475 U.S. 412, 428-31 (1986); United States v. Hayes, 231 F.3d 663, 673 n. 4 (9th Cir. 2000) (collecting cases). This line of cases also stands for the proposition that the Sixth Amendment right to counsel is "offense specific," meaning that "a defendant's statements regarding offenses for which he has not been charged [a]re admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses." Texas v. Cobb, 532 U.S. 162, 168 (2001) (citing McNeil v. Wisconsin, 501 U.S. 171, 175-76 (1991)); see United States v. Danielson, 325 F.3d 1054, 1066 (9th Cir. 2003); Clabourne v. Lewis, 64 F.3d 1373, 1378 (9th Cir. 1995).

Based upon these principles, it is evident that Petitioner's Sixth Amendment right to counsel was not violated when Duncan spoke with him because formal proceedings against Petitioner had not yet been initiated. Petitioner was arrested on September 8,

1978, on a parole violation and suspicion of possessing a stolen car. The jailhouse conversation with Duncan occurred three days later. Mr. Grove's body was identified one month later, on October 11, 1978. Petitioner was indicted for first-degree murder on December 14, 1978.

In his reply, Petitioner argues that his right to counsel had attached because he was the "focus" of the murder investigation at the time of his conversation with Duncan. (Dkt. 98 at 19-20.) Even if true, this is of no significance. As the Ninth Circuit noted, simply being the target or the focus of an investigation is not sufficient to trigger a suspect's Sixth Amendment rights:

> In sum, the Supreme Court, this court, and every other circuit to consider a similar issue has adhered to the rule that adversary judicial proceedings are initiated "by way of formal charge, preliminary hearing, indictment, information, or arraignment." This is a clean and clear rule that is easy enough to follow: Initiating any of these specific proceedings "marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." We are loath to engraft some new, pre-indictment proceeding onto the rule, thereby making it no longer clean and clear-and outside the clear boundaries the Supreme Court has established.

Hayes, 231 F.3d at 675 (quoting Kirby, 406 U.S. at 690). Moreover, as the Supreme Court explained in Gouveia, "we have never held that the right to counsel attaches at the time of arrest." 467 U.S. at 190 (explaining that the right to counsel attaches at the initiation of adversary judicial proceedings because the Sixth Amendment right "exists to protect the accused during trial-type confrontations with the prosecutor").

The decision of the Arizona Supreme Court denying Petitioner's claim that his Sixth Amendment rights were violated by admission of Duncan's testimony was neither contrary to nor an unreasonable application of clearly established federal law. Petitioner is not entitled to relief on this aspect of Claim A.

3. Brady violation.

The prosecutor at Petitioner's first trial, Steven Jaynes, wrote two letters to California authorities on Duncan's behalf, one prior to Duncan's testimony and one at the end of the trial. (Dkt. 82, Ex's 9 and 10.) Petitioner alleges that his Fifth Amendment rights were violated by the failure of Jaynes, and of the prosecutor at the second trial, Frank Dawley, to disclose these letters, as well as a letter written on Duncan's behalf by Detective Halterman.[6] (Id. at 16-22, 36-38.) Respondents concede that prosecutors Jaynes

[6] Claim I, asserting prosecutorial misconduct based upon this alleged discovery violation, is analytically from indistinguishable from this aspect of Claim A, and the Court will address the claims together.

and Dawley should have disclosed the letters, but contend that Petitioner was not prejudiced by the lack of disclosure. (Dkt. 91 at 25-26; see Dkt. 98, Ex. B.) As Petitioner notes, there is no state court decision addressing this aspect of Claim A, so this Court's review of the issue is de novo.[7]

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." The duty to disclose includes impeachment as well as exculpatory material. United States v. Bagley, 473 U.S. 667, 676 (1985).

The government violates its obligation under Brady where (1) the evidence in question was favorable to the accused, (2) the government willfully or inadvertently suppressed the evidence, and (3) prejudice resulted from the suppression (i.e., the evidence was "material"). Strickler v. Greene, 527 U.S. 263, 281-82 (1999); see Banks v. Dretke, 540 U.S. 668, 691 (2004); Kyles v. Whitley, 514 U.S. 419, 433 (1995). Evidence is material for Brady purposes "if there is a reasonable probability that, had the evidence been

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[7] As noted in this Court's procedural status order (Dkt. 59 at 8), Respondents conceded that Petitioner's Claim A had been properly exhausted (Dkt. 29 at 12). Claim A included the subclaim regarding discovery violations. (Dkt. 27 at 46.)

disclosed to the defense, the result of the proceeding would have been different." Kyles, 514 U.S. at 433 (quoting Bagley, 473 U.S. at 682); see Banks, 540 U.S. at 699; Strickler, 527 U.S. at 280.

With respect to the third prong of a Brady violation, the Supreme Court has explained that materiality does not require a showing that the defendant would have been acquitted had the suppressed evidence been disclosed. Id. at 434-35. Instead, a Brady violation occurs if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435.

In the instant case, the second prong of a Brady violation — suppression of the letters written on Duncan's behalf — is not contested. The Court also finds, contrary to Respondents' position, that the first prong has been satisfied. The letters were favorable to the accused, in that they would have served as additional impeachment of Duncan's credibility. See Bagley, 473 U.S. at 683; Barker v. Fleming, 423 F.3d 1085, 1095 (9th Cir. 2005). The Court concludes, however, that Petitioner has not satisfied the third component of a Brady violation: he has not shown that disclosure of the letters would have "put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435.

First, the case against Petitioner was based on circumstantial evidence linking him to Mr. Grove's murder. This evidence was independent of Duncan's testimony about Petitioner's statements, and its

validity would not have been affected by additional impeachment of Duncan's credibility. See Willhoite v. Vasquez, 921 F.2d 247, 249 (9th Cir. 2000) (while the witness's testimony was important, there was sufficient evidence apart from it "to carry the case to the jury") (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)). Moreover, Duncan was not the principal witness against Petitioner, nor was his testimony "the glue that held the prosecution's case together." Horton v. Mayle, 408 F.3d 570, 579 (9th Cir. 2005) (suppressed impeachment evidence is more likely to violate Brady where a witness is central to the government's case). In Horton, for example, the Ninth Circuit reversed the denial of a habeas petition, holding that the state had violated Brady by failing to disclose a deal which would have provided immunity for the prosecution's star witness, who testified that the petitioner had confessed to robbing and murdering a drug dealer. Id. at 573, 579.

Also, as Respondents note, the impeachment value of the letters themselves was limited because they were written at the time of Petitioner's first trial and there was no evidence that Duncan was receiving benefits for his testimony at Petitioner's retrial six years later.

Finally, Duncan's credibility was significantly impeached during his testimony at the second trial. On direct examination, Duncan acknowledged that he was presently in jail on a petty theft charge and that his criminal record included a conviction for grand theft auto (RT 6/21 /85 at 818). He also acknowledged that he had contacted Detective Halterman about the stolen

Cadillac because Halterman had treated him favorably after arresting him as a fugitive. (Id. at 821-22). On cross-examination, defense counsel emphasized Duncan's criminal record (id. at 827-31), attacked his motives for assisting Detective Halterman (Id. at 832, 835), and noted that Duncan received a monetary reward from the bank for turning in the stolen credit cards (id. at 836-37). Counsel also examined Duncan about the letter Detective Halterman had promised to write on his behalf to the California authorities (id. at 837-39) and about Duncan's discussions with prosecutor Jaynes concerning the possibility that Jaynes could assist him with his charges in California in return for Duncan's testimony (id. at 856-57).

Given the nature of the impeachment to which Duncan was subjected during his testimony, any additional impeachment based upon the undisclosed letters would "merely duplicate the grounds for impeaching [Duncan] that were actually presented to the jury." Barker, 423 F.3d at 1096. The undisclosed information was not of a different character than the evidence that was presented, and did not "provide the defense with a new and different ground of impeachment." Id. (quotation omitted); see Silva v. Brown, 416 F.3d 980, 988 (9th Cir. 2005) (although the witness was impeached on the grounds of his plea deal, the prosecution's failure to disclose an agreement by which the witness was foreclosed from seeking a psychiatric examination was material for Brady purposes); Horton, 408 F.3d at 580 (although witness's testimony was impeached by evidence of drug use, lying to police, and assisting in the crime, withheld

evidence of promised immunity was a "wholly different kind of impeachment evidence").

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997), relied on by Petitioner for the proposition that the state violates Brady when it withholds cumulative impeachment evidence, is distinguishable. In Carriger, the state withheld the Department of Corrections file of its principal witness, Dunbar, whose testimony that Carriger had confessed to the murder was the centerpiece of a case with weak physical evidence. Id. at 465-66. Adding to the significance of Dunbar's credibility was the fact that Carriger's defense was that Dunbar had committed the murder. Id. at 465. Dunbar's file contained information revealing his "long history of lying to the police and blaming his crimes on others." Id. at 479. Although the prosecution acknowledged that Dunbar was testifying under a grant of immunity and had a criminal record for burglary, it repeatedly vouched for his credibility, and Dunbar himself offered testimony about his nonviolent and truthful character-testimony that was emphatically contradicted by the information contained in the undisclosed file. Id. at 480-81. The Ninth Circuit rejected the argument that the undisclosed information was cumulative and not material, noting that the jury had not been presented with "evidence of [Dunbar's] long history of falsely blaming others for his misdeeds" or his violent tendencies. Id. at 481.

At Petitioner's trial, by contrast, Duncan was impeached with the same category of information contained in the letters the prosecutors failed to

disclose. Defense counsel elicited testimony from Duncan that Detective Halterman had offered to assist him with his legal situation in California (RT 6/21/85 at 832, 835) and that Duncan had sought similar aid from prosecutor Jaynes (Id. at 856-57). Counsel's access to the letters themselves would not have substantially altered the quality of the impeachment to which Duncan was subjected, nor would the additional impeachment evidence afforded by the letters have "put the whole case in ... a different light." Kyles, 514 U.S. at 435, 115 S.Ct. 1555. Accordingly, Petitioner is not entitled to relief on his claim that his due process rights under Brady were violated by the prosecution's failure to disclose the letters written on Duncan's behalf.

For the reasons set forth above, Petitioner is not entitled to habeas relief on Claim A or Claim I.

Claim B: **The prosecution failed to preserve potentially exculpatory evidence in violation of Petitioner's right to due process.**

Petitioner alleges that the state violated his due process right to a fair trial by failing to preserve and process various items of physical evidence found in the Ford and Cadillac and by failing to preserve items found near Mr. Grove's body.[8] (Dkt. 82 at 24-30.)

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[8] Petitioner alleges that in the following instances evidence was not properly processed or preserved. (Dkt. 82 at 23-28.) Neither the Ford driven by Petitioner nor Mr. Grove's Cadillac was searched for trace evidence, such as soil samples, (Continued)

Petitioner argues that as a result of the state's failure to conduct a competent and complete homicide investigation, he was denied access to "potentially exculpatory evidence." (Id. at 30.) According to Petitioner, the prejudicial effect of these investigative shortcomings was particularly egregious because the evidence against him was entirely circumstantial. (Id. at 22-24, 29).

1. State court ruling.

Prior to trial, defense counsel moved to dismiss the charges based upon the destruction of evidence. (ROA-PCR 168.) The trial court denied the motion. (M.E.6/14/85.) However, the court agreed to provide, over the State's objection, a so-called Willits instruction.[9] (RT 6/27/85 at 1341.)

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hairs, and fibers. Items found in the Ford, including women's clothing, cigarettes, and a pipe containing marijuana, were not processed or preserved, and the mirror device discovered in the vehicle's trunk was not fingerprinted. Beer cans and a V.A. card found at the pullover below which Mr. Grove's body was located were not fingerprinted or preserved. No hair samples or fingernail scrapings were taken from Mr. Grove's body; no soil or fiber samples were taken from his clothes, and the clothing itself was destroyed. A set of keys found on Mr. Grove was returned to his estate. By the time of the second trial, items that had not been lost or destroyed – including, most significantly, the mirror – were no longer capable of rendering recoverable fingerprints.

[9] Pursuant to the holding in State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964), the trial court instructed the jury as follows: "If you find that the plaintiff, in this case the State of Arizona, has destroyed, caused to be destroyed or allowed to be destroyed any evidence whose contents or quality are in issue, you (Continued)

On direct appeal, the Arizona Supreme Court rejected Petitioner's argument that the state's failure to process and preserve evidence constituted a violation of his right to a fair trial. Schad III, 163 Ariz. at 415-16, 788 P.2d at 1166-67. In its analysis, the court first cited California v. Trombetta, 467 U.S. 479 (1984), for the proposition that the state has a duty to preserve evidence material to a suspect's defense. Id. The court next explained that "a Willits instruction adequately protects a defendant's due process rights where the state has destroyed or failed to preserve evidence unless the defendant is prejudiced *or the state acted in bad faith.*" Id. at 416, 788 P.2d at 1167 (emphasis added). Finally, the court held that the Willits instruction given by the trial court "adequately protected the defendant's rights." Id. The court contrasted Petitioner's trial with cases in which the destroyed items were the only evidence linking the defendant to the crime. Id. The court concluded by observing that Petitioner was not prejudiced by the destruction of evidence:

> [I]n the present case, the best that the defendant could hope for is that none of his fingerprints were on the mirror, clothing or other items. While this would have excluded the defendant from the set of persons whose prints were on these items, it would not have excluded the defendant from ever having handled any of

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may infer that the true fact is against their interest." (RT 6/27/85 at 1402.)

> these objects, nor would it have exonerated him of the alleged crime. The Willits instruction accomplished the most that the defendant could have proved-that his prints were not on these items. We find that the defendant's rights were adequately protected.

Id.

2. Analysis.

The Due Process Clause of the Fourteenth Amendment imposes a duty on the state to preserve evidence that "might be expected to play a significant role in the suspect's defense." Trombetta, 467 U.S. at 488. Under the Trombetta standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 489, 104 S.Ct. 2528. To establish a due process violation when the government fails to preserve evidence that is only potentially exculpatory, the petitioner must demonstrate that the government acted in bad faith. Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988).

Contrary to Petitioner's argument, the evidence at issue does not meet the Trombetta standard of possessing an "exculpatory value that was apparent before it was destroyed." 467 U.S. at 489. While a number of the items were of evidentiary interest, there is no indication that they possessed exculpatory value or that such value was apparent before the items were

destroyed. See Youngblood, 488 U.S. at 56, n* (in child molestation case, the possibility that destroyed semen samples could have proved exculpatory "is not enough to satisfy the standard of materiality in Trombetta "). The presence, let alone the exculpatory value, of fingerprints on beer cans found at a heavily used pullover near Mr. Grove's body or on a device belonging to Mr. Grove but discovered in the locked trunk of a car used by Petitioner, or trace evidence on Mr. Grove's heavily deteriorated shirt, is a matter of pure speculation. Because such evidence clearly falls into the "potentially useful" category, the Youngblood standard applies, and Petitioner has the burden to "show bad faith on the part of the police." Id. at 58; see Mitchell v. Goldsmith, 878 F.2d 319, 322 (9th Cir. 1989) (failure to preserve evidence of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant, is not a denial of due process unless a criminal defendant can show bad faith).

As noted above, the Arizona Supreme Court held that the Willits instruction given by the trial court was adequate to vindicate Petitioner's right to a fair trial under Trombetta. Schad III, 163 Ariz. at 416, 788 P.2d at 1167. Implicit in that holding was a determination that the state did not act in bad faith. Id. This Court must determine whether that holding involved an unreasonable application of clearly established federal law.

Petitioner's only argument in support of his claim that the police acted in bad faith is his characterization of the investigation as substandard

for a homicide case. (Dkt. 82 at 28-29.) This characterization, if accurate, shows at most negligence, as opposed to bad faith, on the part on the investigators. Youngblood, 488 U.S. at 58; see Villafuerte v. Stewart, 111 F.3d 616, 625-26 (9th Cir. 1997) (per curiam) (officers' failure to test for fingerprints in certain areas and failure to perform tests on semen samples did not demonstrate bad faith). In addition, as the court noted in Villafuerte, the police do not have a "constitutional duty to perform all tests desired" by a suspect. 111 F.3d at 625 (citing Youngblood, 488 U.S. at 59).

Petitioner has not shown, or even alleged, that the police acted with "animus" or engaged in "a conscious effort to suppress exculpatory evidence." *Trombetta*, 467 U.S. at 488. The investigators' conduct bears no relationship, for example, to that described in Miller v. Vasquez, 868 F.2d 1116 (9th Cir. 1989). In Miller, the Ninth Circuit reversed the district court's denial of a habeas petition. The court found that the petitioner had presented a colorable claim that the investigating officer acted in bad faith when he failed to collect the rape victim's blood-stained jacket and failed to photograph scratches on the petitioner's arms. Id. at 1121. The record contained evidence that the officer acted in bad faith: he referred to the petitioner using "an extremely derogative expletive," lied about his knowledge of the bloody jacket, and tried to dissuade witnesses from testifying in the defendant's favor. Id. The Circuit remanded the matter to the district court for a determination of the petitioner's bad faith claim. Id.

By contrast, Petitioner here has failed to make any showing that the officers conducting the investigation acted in bad faith when they failed to perform certain tests or destroyed items of evidence. See, Gausvik v. Perez, 345 F.3d 813, 817 (9th Cir. 2003) (to demonstrate bad faith defendant must "put forward specific, nonconclusory allegations that establish improper motive"). Petitioner has failed to meet his burden under Youngblood.

The Arizona Supreme Court's finding that the police did not act in bad faith, and consequently that Petitioner's right to a fair trial was not violated, was not an unreasonable application of clearly established federal law as set forth in Trombetta and Youngblood. Petitioner is not entitled to relief on Claim B.

The Court further finds that Petitioner has failed to allege a colorable claim of bad faith sufficient to warrant an evidentiary hearing. See Miller, 868 F.2d at 1121.

Claim H: **The evidence produced at trial was not sufficient to sustain Petitioner's conviction.**

Petitioner contends that there was insufficient evidence to support his murder conviction. (Dkt. 82 at 30-36.) Petitioner argues that the State's case "was based on inferences drawn from circumstantial evidence" and that "no circumstantial evidence connected [Petitioner] to Mr. Grove's death." (Id. at 30.) Petitioner raised this claim in his preliminary PCR petition. (ROA-PCR 245 at 8-9.) The PCR court denied

the claim as procedurally precluded.[10] (M.E.3/27/96.) Because the state court did not address the merits of the claim, a de novo review is required. Pirtle v. Morgan, 313 F.3d at 1167.

There is sufficient evidence to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *916 any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). In making such a determination, a reviewing court is guided by a number of principles which reflect the doctrine that "deference [is] owed to the trier of fact." Wright v. West, 505 U.S. 277, 296 (1992). For example, "a federal habeas court faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326. In addition, it is the province of the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate

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[10] In its procedural status order of May 8, 2000, this Court found, with respect to Claims H, I (in part), N, O, P, and R, that the trial court's PCR order was based upon a finding that the claims were precluded pursuant to Rule 32.2(a)(2) of the Arizona Rules of Criminal Procedure, which precludes relief for claims that have been finally adjudicated on the merits on appeal or in collateral proceedings. (Dkt. 59 at 10.) Because claims precluded pursuant to this subsection have been properly exhausted, the Court decided that it would review the claims on the merits. (Id.)

facts." Jackson, 443 U.S. at 319; see Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir.1995). As the Ninth Circuit has explained, "The question is not whether we are personally convinced beyond a reasonable doubt. It is whether rational jurors could reach the conclusion that these jurors reached." Roehler v. Borg, 945 F.2d 303, 306 (9th Cir.1991) (citing Jackson, 443 U.S. at 326).

While "mere suspicion or speculation cannot be the basis for creation of logical inferences ... [c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir.1986); see United States v. Johnson, 804 F.2d 1078, 1083 (9th Cir. 1986) (the government is entitled to all reasonable inferences that may be drawn from the evidence). Moreover, "the government's evidence need not exclude every reasonable hypothesis consistent with innocence." United States v. Talbert, 710 F.2d 528, 530 (9th Cir. 1983) (per curiam); see United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991) ("The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict"); see Wright, 505 U.S. at 296-97; Jackson, 443 U.S. at 326.

The Court has reviewed the evidence presented at trial and concludes that it was sufficient to support Petitioner's convictions. As viewed in the light most favorable to the state, the following facts support Petitioner's murder conviction.

Leroy Grove, age 74, was last seen alive on August 1, 1978, in Bisbee, Arizona, as he was leaving

on a trip to Washington state to visit his sister. (See RT 6/19/85 at 340; RT 6/20/85 at 565-70.) The next day, August 2, 1978, Petitioner was driving Mr. Grove's Cadillac and using Mr. Grove's credit card to purchase gasoline in Benson, Arizona. (RT 6/25/85 at 924.) On August 3, 1978, Petitioner purchased gas with Mr. Grove's credit card at a station in New Mexico. (Id. at 923.)

Also on August 3, 1978, a Highway trooper discovered an abandoned vehicle, a Ford Fairmont, hidden behind some trees off of Highway 89, twenty miles north of Flagstaff, Arizona. (RT 6/20/95 at 454-55.) The Fairmont had been rented by Petitioner on December 31, 1977, from a dealership in Sandy, Utah, and was never returned. (RT 6/20/85 at 414-16.) The vehicle contained items belonging to the children of Petitioner's live-in girlfriend, Wilma Erhardt. (RT 6/21/85 at 784.) The vehicle also contained newspapers from Phoenix and Mesa dated July 31 and August 1, 1978, indicating that it had not been abandoned prior to the date on which Mr. Grove began his travels. (RT 6/25/85 at 971-72.) In the locked trunk of the vehicle officers located a mirror designed by and belonging to Mr. Grove. (See RT 6/19/85 at 342-43; 6/20/95 at 443-44, 495-96, 573; 6/25/85 at 889.) Petitioner had removed the Ford's dealer plates and replaced them with Utah plates from Erhardt's vehicle. (RT 6/21/85 at 784-85.) The Utah plates were later found in the trunk of Mr. Grove's Cadillac. (RT 6/25/85 at 963.)

On August 8, 1978, a highway worker detected an odor of decomposition emanating from the area of a roadside pullover on Highway 89 approximately eleven

or twelve miles south of Prescott. (RT 6/19/85 at 287-88.) The worker discovered Mr. Grove's corpse the next day. (Id.) It was located beneath some brush on an embankment approximately fifteen feet below the edge of the pullover. (Id. at 302; RT 6/25/85 at 958-59.) The hands were at the side of the body and the feet were crossed. (RT 6/20/85 at 382.) A ligature measuring ten and one half inches had been tied around the neck; the circumference of the average male neck is at least fourteen inches. (Id. at 373.) Mr. Grove had been strangled to death; the hyoid bone in his neck was fractured. (RT 6/19/85 at 361-62.) The cause of death was homicide. (Id. at 363.) The state of decomposition indicated that the body had been there for at least four days and possibly as long as a week. (RT 6/20/85 at 375.)

On September 3, 1978, Petitioner was stopped for speeding by a trooper in upstate New York; he was driving Mr. Grove's Cadillac. (RT 6/20/85 at 551-56.) Petitioner told the trooper that he was driving the Cadillac on behalf of his friend Mr. Grove, an elderly man who was too old to travel; he was taking the car to Bridgeport, New York, where he would meet Mr. Groves. (Id. at 553.) On September 8, 1978, Petitioner was arrested in Salt Lake City, Utah, again driving Mr. Grove's Cadillac. This time, he explained to authorities that he had obtained the vehicle in a trade with an elderly man in Norfolk, Virginia. (RT 6/21/85 at 682-83.) Prior to his arrest, he offered a third version of how he had come into possession of the Cadillac, telling Erhardt that he had obtained the

vehicle through a trade with an old man in Columbus, Ohio.[11] (Id. at 786-87.)

As previously discussed, after his arrest Petitioner spoke with John Duncan. He indicated to Duncan that he would deny to the authorities that he had been in Tempe or Prescott. (Id. at 825.) He also asked Duncan to destroy the credit card evidence. (Id.)

From August 2, 1978, to the time of his arrest, Petitioner used Mr. Grove's credit cards as he traveled throughout the United States, making fraudulent purchases at locations in twenty-eight states. (RT 6/25/85 at 976.) He also forged a check to himself on Mr. Grove's account and cashed it in Des Moines, Iowa, on August 7, 1978. Along with the credit cards, when Petitioner returned to Utah he was in possession of a ring owned by Mr. Grove. (See RT 6/21/85 at 643; RT 6/25/85 at 964-65.)

Although Petitioner changed the license plates on the Ford Fairmont to prevent it from being traced as a stolen vehicle, he left the original plates on the Cadillac as he drove it throughout the country for more than a month. (See RT 6/21/85 at 624, 6/25/85 at 925.) This circumstance suggested that Petitioner was not

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[11] At his first trial, Petitioner testified that he had obtained the Cadillac on August 2, 1978, in a trade with a French couple at a Phoenix truck stop. (RT 10/4/79 at 17-40.) According to Petitioner, the deal was brokered by a fellow inmate who had escaped from the Utah penitentiary and was working at an amusement park. (Id.) Petitioner did not testify at his retrial.

concerned that the vehicle's owner would report it as stolen.

In challenging the quality of the evidence upon which his conviction was based, Petitioner theorizes that Mr. Grove was murdered by one of a number of alternative suspects, or that he strangled himself to death. Such speculation is unsupported by the trial record. It is also insufficient to merit relief under Jackson. As the Ninth Circuit has explained, pursuant to Jackson, "[t]he existence of some small doubt based on an unsupported yet unrebutted hypothesis of innocence is not sufficient to invalidate an otherwise legitimate conviction." Taylor v. Stainer, 31 F.3d 907, 910 (9th Cir. 1994).

Based upon the information presented at trial, a rational juror could have found proof of Petitioner's guilt beyond a reasonable doubt.[12] Therefore, Petitioner is not entitled to relief on Claim H.

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[12] In Schad I, the Arizona Supreme Court reached the same conclusion. 129 Ariz. at 572, 633 P.2d at 381. Citing Jackson, the court rejected Petitioner's argument that his conviction should be overturned for lack of evidence:

> After reviewing the entire record, we are of the opinion that there was sufficient evidence from which a rational trier of fact could have found guilt beyond a reasonable doubt. Without recounting every incriminating fact which would support the conviction, we observe that defendant gave numerous contradictory versions as to how he came into possession of the victim's

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Claim J: Ineffective assistance of counsel—guilt phase.

Petitioner alleges that trial counsel was ineffective in two ways: (1) his failure to locate Mr. Duncan's wife, and (2) his failure to convince the court to admit evidence of the victim's mental health. (Dkt. 82 at 38.) Petitioner raised these claims in his supplemental PCR petition (ROA-PCR 319), and the court rejected them (M.E. 6/21/96 at 1-2).

As previously discussed, when a state court has addressed the merits of a petitioner's claim of federal

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Cadillac; denied using the victim's credit cards, and stated he had never been in Arizona until he discovered that the authorities could place him there on several occasions; personal effects belonging to the victim were found in the Ford Fairmont; a diamond ring belonging to the victim was found on Wilma [Erhardt's] finger; although defendant professed to have never met Larry Grove, he apparently knew that the victim was an elderly man when stopped by the New York State Trooper; defendant testified that several items of personal property found in the Cadillac were his, although other witnesses testified that they belonged to the victim. Based upon these facts and other evidence presented by the State, we cannot say that the jury was unjustified in disbelieving defendant's version of how he acquired the Cadillac. We find no error

Id.

constitutional error, a federal court may grant habeas relief only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); see Yarborough v. Gentry, 540 U.S. 1, 4 (2003) (per curiam); Woodford v. Visciotti, 537 U.S. at 21. For a claim alleging ineffective assistance of counsel ("IAC"), the applicable law is set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984).

To prevail under Strickland, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. 466 U.S. at 687-88. The inquiry under Strickland is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. To prove deficient performance, a defendant must also overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Under the AEDPA, the state court's decision is subject to another level of deference. Bell v. Cone, 535

U.S. 685, 698-99 (2002). In order to merit habeas relief, therefore, Petitioner must make the additional showing that the state court's ruling that counsel was not ineffective constituted an unreasonable application of Strickland. 28 U.S.C. § 2254(d)(1). The Court finds that Petitioner has failed to satisfy either Strickland or the AEDPA's deferential standard.

1. Failure to locate Duncan's wife.

Petitioner contends that Duncan's former wife, Sharon Sprayberry, possessed information that would have "completely impeached" Duncan's testimony regarding the statements Petitioner made during their jailhouse conversation. (Dkt. 82 at 38.) In an affidavit dated May 11, 1995, Sprayberry said that Duncan's visit to Petitioner was in fact arranged by Detective Halterman, that she was present at the conversation between Petitioner and Duncan, and, significantly, that "[d]uring the jail visit with Mr. Schad, Mr. Schad did not make any statements relating to a homicide in Arizona." (ROA-PCR 319, Ex. 2.)

The PCR court rejected Petitioner's claim that trial counsel was ineffective for failing to locate Sprayberry and secure her testimony.[13] (M.E. 6/21/96

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[13] In its order, the PCR court indicated that Sprayberry's "whereabouts were known by the defense at the time of the trial." (M.E.6/21/96.) Petitioner disagrees, as does trial counsel (Dkt.83, Ex. 3), but acknowledges that counsel's efforts to locate her were "diligent and thorough." (Dkt. 82 at 39.) Respondents observe that in his trial testimony Duncan indicated that his wife was in Johnson, Texas. (RT 6/21/85 at 852.) Given the Court's resolution

(Continued)

at 2.) The court explained that this failure was not prejudicial:

> The proposed testimony of Sharon Sprayberry is certainly not new-it is merely cumulative impeachment and it is therefore, not even particularly material. Even if the testimony of Sharon Sprayberry as presented in affidavit form in this proceeding were accepted as true, this court cannot imagine how the outcome of this trial would have been changed by offering this rather limited impeachment testimony in the face of the overwhelming proof of the defendant's guilt from a variety of sources. This claim has no merit.
> (Id.)

This Court agrees that Petitioner has not shown that he was prejudiced by counsel's failure to present testimony from Sprayberry. The key information provided in the Sprayberry affidavit has little or no impeachment value because it does not contradict Duncan's testimony. According to Duncan, Petitioner told him that he would deny being in Arizona, particularly Prescott and Tempe; Duncan did not testify that Petitioner said anything about a homicide. (RT 6/21/85 at 825.) Duncan's testimony is therefore completely consistent*920 with the statement in Sprayberry's affidavit that Petitioner "did not make

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of this issue on the grounds of lack of prejudice, the Court need not evaluate counsel's efforts to locate Sprayberry.

any statements relating to a homicide in Arizona." (ROA-PCR 319, Ex. 2.) The remaining information in the affidavit consists primarily of inadmissible double hearsay relating what Duncan told Sprayberry about what Detective Halterman had told him. (Id.)

Petitioner further contends that the PCR court employed the incorrect standard for evaluating prejudice under Strickland. (Dkts. 82 at 40-41, 98 at 40.) The court stated that it "cannot imagine how the outcome of this trial would have been changed" by presenting Sprayberry's testimony. (M.E. 6/21/96 at 2.) According to Petitioner, this statement indicates that the court employed a higher, or "preponderance of the evidence," standard for showing prejudice than that required by Strickland – i.e., a reasonable probability of a different outcome. (Dkt. 82 at 41.) The Court disagrees. While the PCR court's formulation does not use the phrase "reasonable probability," the most plausible reading of the statement, keeping in mind the presumption that courts are presumed to know and apply the law, see, e.g., Beaty v. Stewart, 303 F.3d 975, 986 (9th Cir. 2002), is that in using the phrase "cannot imagine" the PCR court indicated that there was no reasonable probability that the outcome of the case would have been different if Sprayberry had testified. See Kyles v. Whitley, 514 U.S. 419 (1995). In any case, even under a de novo review of the issue, this Court finds that Petitioner's claim of prejudice lacks merit.

Petitioner was not prejudiced by trial counsel's failure to present testimony from Sprayberry. The PCR court's denial of this claim was neither contrary to nor an unreasonable application of federal law.

2. Failure to properly present motions for the appointment of an expert on the victim's mental health and for the admission of the victim's mental health records.

Petitioner alleges that trial counsel was ineffective for failing to make a proper offer of proof regarding Mr. Groves' mental health records. (Dkt. 82 at 45-49.) Petitioner also claims that counsel's performance was ineffective based on his failure to move the trial court to reconsider its denial of his motion for the appointment of an expert witness regarding the victim's mental health. (Id.)

Trial counsel, in an attempt to support one of his defense theories-that the victim committed suicide by strangling himself to death-moved the court to appoint Dr. Otto Bendheim for the purpose of performing a "psychiatric autopsy" of Mr. Grove.[14] (ROA-PCR 156.) In his motion, counsel indicated that Dr. Bendheim had reviewed Mr. Grove's medical records and reached the "tentative conclusions" that at the time of his death "Mr. Grove was suffering from a depressive neurosis, schizophrenia and was psychotic," that his mental

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[14] In his motion, counsel also advanced the proposition that Mr. Grove's deteriorating mental state may have led him to act recklessly and associate with dangerous persons. (ROA-PCR 156 at 2-3.) Petitioner no longer relies on this theory as a basis for the admissibility of information about the victim's mental state at the time of his death, presumably because it is indistinguishable from the scenario presented to the two juries that convicted Petitioner.

health had recently deteriorated, and that "he was potentially very suicidal." (Id. at 3.) The State filed a response in opposition to the motion (ROA-PCR 169), and defense counsel filed a reply memorandum (ROA-PCR 181), which again detailed counsel's arguments in favor of the admissibility of the records. The trial court denied the motion summarily. (M.E.6/14/85.)

Near the close of his case, defense counsel sought to introduce Mr. Grove's medical records from the Veterans' Administration in Tucson; counsel made an oral offer of proof as to the contents and relevancy of the records. (RT 6/27/85 at 1320-21.) The trial court granted the State's motion to exclude the records, finding that the evidence adduced at trial did not support the theory that Mr. Grove strangled himself, that Mr. Grove's medical records were irrelevant, that their introduction constituted an attack on the victim's character, and that the information contained therein would confuse the jury and be unduly prejudicial. (Id. at 1323-24.)

In his preliminary PCR petition, Petitioner raised the claim that trial counsel's efforts to present evidence of Mr. Grove's mental health were deficient. (ROA-PCR 245 at 9-10.) In rejecting the claims, the PCR court explained:

> [C]ounsel once again argues that Dr Otto Bendheim should have been appointed to perform a psychological autopsy on the victim of this murder. Counsel now advances the theory that it was ineffective assistance of counsel to fail to move the court for reconsideration of its

> order denying this request and fail to introduce the victim's mental health records. This court cannot imagine what would have been accomplished (after full briefing and oral argument) to move for reconsideration. This court would not have reconsidered that ruling and is not reconsidering it now. The defendant has not pointed out how introduction of the psychological records would have swayed the court's judgment because of defendant is [sic] unable to do so. There is no allegation that newly discovered evidence is now available to cause the court to reconsider what this court considers to be an imminently [sic] correct decision. Quite simply put, defense counsel is under no obligation to file frivolous pleadings and this is precisely what the defendant is suggesting that counsel should have done. The claim has no merit.

(M.E. 6/21/96 at 1-2.)

Petitioner again contends that counsel should have moved the court to reconsider its order denying the appointment of Dr. Bendheim; according to Petitioner, the appropriate procedure would have been for counsel to have made an offer of proof referencing the testimony of witnesses who had observed Mr. Grove's allegedly uncharacteristic behavior in the period leading up to his death. (Dkt. 82 at 46.) Petitioner also asserts that counsel should have made a more extensive offer of proof regarding the victim's medical records. (Id.) Petitioner argues that such a proffer, which should have included testimony from Dr.

Bendheim, would have remedied the trial court's misunderstanding regarding the purpose for which the records were being offered. (Id. at 46-47.)

The Court notes that the issue underlying this aspect of Petitioner's IAC claim – the admissibility of evidence regarding the victim's mental condition – involves a state court's evidentiary ruling.[15] As the United States Supreme Court has explained, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67 (1991). Because the PCR court, applying state evidentiary rules, determined that the evidence was inadmissible, this Court cannot find that trial counsel was ineffective for failing to try a different tactic to secure its admission.

In addition, the Court finds that Petitioner was not prejudiced by the manner in which counsel sought permission from the court to raise the victim's mental health as a defense. It is apparent, for example, that the PCR court did not misapprehend the purpose of counsel's attempt to present evidence of the victim's mental health. Counsel made it clear, in his filings seeking the appointment of Dr. Bendheim and in his oral offer of proof regarding the medical records, that his goal was to use such information to support his

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[15] Petitioner concedes that this aspect of his IAC claim is premised on a finding that the trial court erred in its rulings on defense counsel's motions. (Id. at 46.) As discussed with respect to Claim AA, the Court has found that those rulings were not erroneous.

theory that Mr. Grove committed suicide. In its order denying the IAC claim, the court explained that it made its rulings denying trial counsel's motions "after full briefing and oral arguments." (M.E. 6/21/96 at 2.) The court then indicated that, even had trial counsel proceeded in the manner Petitioner now advocates, the court would not have reconsidered its evidentiary rulings. (Id.) Based upon the PCR court's order, this Court cannot find that Petitioner has shown any probability that trial counsel's failure to file a motion to reconsider or to present a more detailed offer of proof affected the trial court's rulings; consequently, Petitioner has failed to show that, absent the alleged deficiencies in counsel's performance, there was a reasonable probability that the outcome of the case would have been different.

For the reasons set forth above, the PCR court's rejection of Petitioner's guilt-stage IAC claims was neither contrary to nor an unreasonable application of clearly established federal law. Therefore, Petitioner is not entitled to relief on Claim J.

Claim L: **Petitioner's rights under the Fifth, Eighth, and Fourteenth Amendments were violated by the use of his prior conviction for second-degree murder as an aggravating circumstance.**

Petitioner alleges that his rights were violated when the trial court improperly determined that his prior conviction for second-degree felony murder was an aggravating circumstance under former A.R.S. § 13-454(E)(1) ("that the defendant has been convicted of

another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable") and (E)(2) (prior conviction for a felony involving violence).[16] (Dkt. 82 at 50.) Petitioner also challenges the constitutional validity of the prior conviction. Petitioner's arguments lack merit.

1. Background.

In 1968, a Salt Lake County jury convicted Petitioner of felony murder in the second degree. See State v. Schad, 24 Utah 2d 255, 257, 470 P.2d 246, 247 (1970). The court imposed a sentence of ten years to life. (ROA-PCR 223 at 3.) Petitioner appealed the conviction on the grounds that the evidence was insufficient to justify the verdict and that the trial court erred in giving a felony-murder instruction relating to sodomy. Schad, 24 Utah 2d at 257, 470 P.2d at 247. The Utah Supreme Court upheld the conviction. Id. at 261, 470 P.2d at 250.

Rejecting the first claim, the court reviewed the evidence produced at trial, which included undisputed facts that linked Petitioner to the victim and the crime scene and that contradicted Petitioner's version of events.[17] The court concluded that it was "unable to

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[16] These aggravating factors are now codified at A.R.S. § 13-703(F)(1) and (F)(2).

[17] The body of the victim, Clare Mortensen, was found in a closet; "his hands were tied behind his back with leather thongs and nylon cord; his ankles were also bound and two pieces of cloth were tied around his mouth and neck." Schad, 24 Utah 2d at 258, 470 P.2d at 247. Laces from a pair of combat boots were used to (Continued)

say that reasonable minds could not have believed beyond a reasonable doubt that the defendant committed the crime." Id. at 259, 470 P.2d at 248.

The Utah Supreme Court also rejected Petitioner's argument regarding the felony–murder instruction. Citing the state's murder statutes,[18] the court ruled:

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bind the victim; a witness observed that Petitioner's combat boots were missing their laces. Id. Petitioner, who was absent without leave from the Army at the time, was seen with the victim before his death; he subsequently lied to several acquaintances about the victim's whereabouts. Id. at 258-59, 470 P.2d at 247-48. After Mr. Mortenson's death Petitioner had possession of his wallet, which he discarded in his, Petitioner's, hotel room; he also used the victim's credit card to purchase an airline ticket to Germany, where he was eventually apprehended. Id. at 259, 470 P.2d at 248.

Physical evidence of a sexual encounter was found on the deceased, and the medical examiner, Dr. James Weston, opined that "death had resulted because deceased's neck had been bound so tightly it prevented a return flow of blood from his head; and that this had been done to heighten erotic stimulus in an act of sodomy." Id. Dr. Weston also indicated that in his opinion the death was probably accidental. (See RT 8/22/85 at 30.)

[18] At the time of Petitioner's 1968 conviction, Section 76-30-3, U.C.A.1953, provided:

> Degrees of murder.–Every murder perpetrated by poison, lying in wait or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than the one who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of

(Continued)

Defendant seems to essay the position that because the killing was not in the commission of one of the named felonies involving violence: arson, rape, burglary or robbery, there should have been no instruction on felony murder. This position is not tenable because it ignores the subsequent portions of our statute. It is not to be doubted that murder must come within the definition set forth therein. But that also provides for "any other homicide committed under circumstances which would have constituted murder at common law." This included death resulting from the perpetration of any felony. We agree with the reasoning of the cases cited by the defendant that in order for death to constitute murder because it results in the commission of a felony, the felony must be one which may cause death because it may be dangerous to human life. This reasoning correlates with the part of our statute making it murder if a death results from "any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life." However, we fail to see how that affords any comfort or protection to the defendant in this case. In listing certain felonies which are

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human life;—is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree.

> dangerous to the lives of others, it certainly was not intended to exclude other felonies which might be so; and this must be determined from the circumstances of the particular crime.

Id. at 260-61, 470 P.2d at 249-50.

2. A.R.S. § 13-454(E)(1).

On federal habeas review of the state court's application of aggravating factors, this Court considers only whether the state court's finding "was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (counseling that such a review demands "respect for a state court's findings of fact and application of its own law"); see Moormann v. Schriro, 426 F.3d 1044, 1053 (9th Cir. 2005).

Petitioner claims that the prior conviction was not an offense "for which under Arizona law a sentence of life imprisonment or death was imposable" under § 13-454(E)(1) because the Utah conviction did not satisfy the elements of second-degree murder in Arizona at the time he was convicted. (Dkt. 82 at 53-55.) Petitioner contends that the 1968 conviction does not support a finding of "malice aforethought," an element of Arizona's second-degree murder statute. (Id.)

On direct appeal, the Arizona Supreme Court rejected Petitioner's claim, explaining that the facts surrounding the 1968 offense brought it into accord with Arizona's definition of second-degree murder:

The main thrust of the defendant's argument is that the changes in the criminal code, reducing the punishment for sodomy to a misdemeanor and the elimination of the offense of second degree felony murder, require that the defendant's Utah conviction not be considered an aggravating circumstance for sentencing. The defendant's argument seeks not only to have us ignore the requirement that we consider the penalty imposable at the time of the conviction, but it mischaracterizes the nature of the defendant's Utah conviction.

In considering a prior offense for sentencing purposes, a court looks at the penalty in effect under Arizona law at the time the defendant was sentenced for the prior offense, not the penalty for the prior offense at the time of sentencing for a subsequent conviction. State v. Tittle, 147 Ariz. 339, 710 P.2d 449 (1985). The defendant concedes that pursuant to former A.R.S. §§ 13-453(B) and -1644, the maximum penalty for second-degree murder in 1968 was life imprisonment. See State v. Williams, 103 Ariz. 284, 440 P.2d 311 (1968). However, the defendant contends that aggravating his sentence under these circumstances would violate his constitutional rights.

Contrary to the contention implicit in defendant's argument, the prior conviction in Utah was not merely for committing sodomy. The defendant was found guilty of committing a

> dangerous act while engaging in sodomy. The Utah Supreme Court specifically found that sodomy performed while engaging in auto-erotic asphyxiation constituted a dangerous felony. See State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970).
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> . . .
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> The defendant's second degree murder conviction in Utah was not based on the mere act of sodomy but the manner in which it was performed. Schad, 24 Utah 2d at 261, 470 P.2d at 250. Irrespective of the debate concerning the constitutionality of statutes prohibiting consensual sodomy, it is clear that a state may lawfully punish a person for engaging in conduct exhibiting knowing or reckless disregard for human life. See A.R.S. §§ 13-1103(A)(1), -104(A)(3). This is the crux of the defendant's Utah conviction. Under similar circumstances the defendant's conduct would have constituted second degree murder in Arizona.

Schad III, 163 Ariz. at 418-19, 788 P.2d at 1169-70.

Petitioner urges this Court to find that the Arizona Supreme Court erroneously interpreted Arizona's second-degree murder and manslaughter statutes. (Dkt. 82 at 54-55.) However, as the Ninth Circuit recently observed, "If a state law issue must be decided in order to decide a federal habeas claim, the state's construction of its own law is binding on the federal court." Horton v. Mayle, 408 F.3d at 576 (citing Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("This Court ... repeatedly has held that state courts are the

expositors of state law, and that we are bound by their constructions except in extreme circumstances not present here") (citations omitted)); see Hawkins v. Mullin, 291 F.3d 658, 662-63 (10th Cir. 2002) (habeas court is bound by state court's interpretation of its felony-murder statute).

In determining that the circumstances surrounding the killing of Mr. Mortenson met the definition of second-degree murder in Arizona, the state supreme court construed its own law. This Court is bound by that interpretation, and thus concludes that the state court's decision was neither arbitrary nor capricious. See Jeffers, 497 U.S. at 780. Therefore, Petitioner's claim that the state courts violated his constitutional rights by erroneously applying the (E)(1) aggravating factor is without merit.

3. A.R.S. § 13-454(E)(2).

Petitioner contends that the trial court erred in finding that his prior conviction involved a crime of violence as defined by A.R.S. § 13-454(E)(2). (Dkt. 82 at 55-56.)

In finding that this factor had been proved, the trial court took judicial notice that a killing in which the "victim was bound hand and foot, gagged and choked to death" was a crime involving violence. (ROA-PCR 225 at 2.) The court also found three aggravating circumstances. (RT 8/29/85 at 10.) Although the court indicated that "[e]ach is a very substantial factor in this court's sentencing decision," it concluded that "the

total mitigation is not sufficient to overcome any one of the aggravating circumstances." (Id.)

On direct appeal, the Arizona Supreme Court declined to determine whether the (E)(2) aggravating circumstance had been established:

> It is not necessary for us to resolve this issue because the trial judge, in his special findings, found that the total mitigation present was "not sufficient to overcome any one of the aggravating circumstances." Any one of the other aggravating factors would be sufficient to support the sentence.

Schad III, 163 Ariz. at 419, 788 P.2d at 1170.

Because both the trial court and the Arizona Supreme Court, in its independent review of Petitioner's sentence, concluded that any one of the aggravating circumstances found by the trial court was sufficient to outweigh the totality of the mitigating evidence, it is unnecessary for this Court to review the trial court's findings regarding § 13-454(E)(2). As discussed below, Petitioner cannot show that he was prejudiced by the trial court's determination that the prior conviction satisfied both (E)(1) and (E)(2).

4. Constitutionality of the 1968 conviction.

Petitioner raises several challenges to the constitutional validity of his 1968 conviction. First, he alleges that he was denied appellate due process in the Utah courts based upon the "failure of the Utah

Supreme Court to fairly and consistently apply the law in Petitioner's case." (Dkt. 82 at 58-59.) This allegation is premised on Petitioner's characterization of the holding in State v. Bolsinger, 699 P.2d 1214 (Utah 1985), a case decided fifteen years after the supreme court affirmed Petitioner's conviction.[19] (Id.) Petitioner also contends that the Utah and Arizona laws criminalizing consensual sodomy are unconstitutional and violate his equal protection and privacy rights.[20] (Id. at 59.)

As Respondents note, Petitioner is precluded from challenging his prior conviction in this habeas

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[19] In Bolsinger, a case involving a death caused by auto-erotic asphyxiation during consensual heterosexual sex, the court held that there was insufficient evidence to support a finding of depravity necessary for a second-degree murder conviction. 699 P.2d at 1219-21. As Respondents observe, Bolsinger involved the interpretation of a different murder statute, and was factually distinguishable from Petitioner's conviction on grounds other than the sexual orientation of the participants. In Bolsinger, the defendant testified at trial, denying that he intended to harm the victim and explaining that he pulled on the clock radio cord around the victim's neck at her insistence during intercourse. Id. at 1215-16. In addition, the victim was highly intoxicated, which may have hastened her death. Id. at 1216. Moreover, the victim in Bolsinger, unlike Mr. Mortenson, was not gagged, nor were her feet bound or her hands tied behind her back. Id. at 1215.

[20] In his Notice of Supplemental Authority, Petitioner cites Lawrence v. Texas, 539 U.S. 558 (2003). (Dkt. 111 at 5.) In Lawrence, the Supreme Court, overruling Bowers v. Hardwick, 478 U.S. 186 (1986), held that the liberty interest protected by the Due Process Clause prohibits states from enacting laws criminalizing homosexual sodomy between consenting adults.

action. In Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 403-04 (2001) (citing Daniels v. United States, 532 U.S. 374, 382 (2001)), the United States Supreme Court explained that:

> [O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

Petitioner does not contend that his 1968 conviction remains open to direct or collateral attack. (See Dkt. 98 at 55-56.) Therefore, his constitutional challenges to the prior conviction are foreclosed and the Court need not address their validity.[21]

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[21] The Coss Court noted that an exception to this rule exists where the petitioner was denied his right to counsel in the prior case. 532 U.S. at 404, 121 S.Ct. 1567. This exception is not applicable because the record reflects that Petitioner was represented by counsel at his 1968 trial. See Schad, 24 Utah 2d at 259, 470 P.2d at 248.

5. Miscellaneous arguments.

Petitioner argues that he is entitled to relief because, after his 1968 conviction, Utah and Arizona reduced the offense of sodomy from a felony to a misdemeanor. (Dkt. 82 at 56.) According to Petitioner, this fact indicates that the imposition of the death penalty in his case was "wanton and freakish." (Id. at 57.) As Respondents note, the Ninth Circuit has squarely rejected the argument that a subsequent reduction in the maximum sentence imposable for a prior conviction renders use of the § 13-454(E)(1) factor "offensive or arbitrary under the Constitution." Gerlaugh v. Stewart, 129 F.3d 1027, 1044 (9th Cir. 1997).

Petitioner also contends that the trial court and the Arizona Supreme Court impermissibly "double-counted" the prior conviction. (Dkt. 82 at 57.) On direct appeal, the Arizona Supreme Court rejected Petitioner's argument that using the prior conviction as the basis for two aggravating factors violated his double jeopardy rights. Schad III, 163 Ariz. at 419, 788 P.2d at 1170. The court explained:

> So long as the trial court weighed the aggravating circumstances arising out of the 1968 murder only once, the defendant's rights have not been infringed. Here the trial judge found that the totality of the mitigating circumstances was insufficient to overcome even a single aggravating factor. Hence, it did not matter that the trial court found two aggravating factors arising from his prior

> conviction since one was enough to impose the death penalty.

Id. (citation omitted).

Neither the trial court nor the Arizona Supreme Court weighed the 1968 conviction twice when assessing aggravating and mitigating factors. In fact, as already noted, the Arizona Supreme Court explicitly declined to consider the (E)(2) factor in its independent review of Petitioner's sentence. Petitioner's argument is without merit.

6. Prejudice.

A habeas petitioner is not entitled to relief unless he can establish that a trial error resulted in actual prejudice. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); see Allen v. Woodford, 395 F.3d 979, 1011 (9th Cir.2005).

In sentencing Petitioner the trial court found that three aggravating circumstances had been proved and determined that the totality of the mitigation evidence was not sufficient to outweigh any single aggravating factor. (ROA-PCR 223.) After carrying out its independent review, the Arizona Supreme Court affirmed the death sentence, finding that two aggravating circumstances existed and agreeing with the trial court that the mitigation evidence was insufficient to outweigh either aggravating factor. Schad III, 163 Ariz. at 421, 788 P.2d at 1172. Given these circumstances, even if this Court were to determine that the 1968 conviction could not form the

basis of a valid aggravating factor, the existence of the pecuniary gain factor would nonetheless be sufficient to support the death sentence. Because elimination of the factors associated with the 1968 conviction would not alter his sentence, Petitioner cannot show that he was actually prejudiced by the use of the prior conviction as an aggravating factor.

In reaching this conclusion, the Court rejects Petitioner's argument that prejudice exists pursuant to the holding in Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). According to Petitioner, because the prior conviction formed the basis of the only two aggravating factors found by the first sentencing court, if that conviction were invalidated, Bullington would bar the imposition of the death sentence at Petitioner' retrial. Petitioner contends, therefore, that he was prejudiced by the state court's erroneous use of the prior conviction as an aggravating circumstance. Petitioner misconstrues the holding in Bullington.

In Bullington, the Supreme Court held that a capital defendant who is sentenced to life imprisonment instead of death is protected by the Double Jeopardy Clause against imposition of the death penalty in the event that he is retried and reconvicted. Id. at 446; see Arizona v. Rumsey, 467 U.S. 203, 211 (1984). This is because a life sentence for a defendant in such a case represents "an acquittal on the merits of the central issue in the [sentencing] proceeding-whether death was the appropriate punishment." Rumsey, 467 U.S. at 211.

This rationale does not apply, however, in a case uch as Petitioner's, where the defendant was not cquitted" of the death penalty at the first trial but as in fact "convicted" – i.e., sentenced to death. oland v. Arizona, 476 U.S. 147, 154 (1986). In Poland, ne first trial court sentenced the defendants to death n the basis of a single aggravating factor, that the rime was committed in an especially heinous manner. ee State v. Poland, 132 Ariz. 269, 285, 645 P.2d 784, 00 (1982). The court found that the pecuniary gain ctor did not apply.[22] Id. The Arizona Supreme Court eversed and remanded for retrial on the grounds of ry misconduct; the court also noted that there was sufficient evidence to support the "especially einous" factor. Id. The defendants were convicted on trial, and the court again imposed the death ntence, this time finding that both the pecuniary ain factor and the especially heinous factor had been roved. See State v. Poland, 144 Ariz. 388, 404, 698 2d 183, 199 (1985). The Arizona Supreme Court gain determined that the especially heinous factor ad not been proved but found that the pecuniary gain ctor was properly applied and upheld the sentence. l. at 405, 407, 698 P.2d at 200, 201.

In affirming the sentence, and distinguishing ne case from Rumsey, where the sentencing court und no aggravating circumstances, the United States upreme Court explained that "the proper inquiry is

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[22] As the supreme court pointed out, the trial court had isconstrued the pecuniary gain factor, believing that it applied ly to contract killings. Poland, 132 Ariz. at 286, 645 P.2d at 801. e infra, p. 42

whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' *that the death penalty is appropriate*." Poland, 476 U.S. at 155 (quotation omitted). In such a case, the Double Jeopardy Clause acts to protect the finality of an acquittal. Id. at 156, 106 S.Ct. 1749. By contrast, where a sentencer convicts a defendant of the death penalty, as the first trial court did with respect to Petitioner, "[t]here is no cause to shield such a defendant from further litigation." Id.

Under Bullington, Rumsey, and Poland, a finding that Petitioner's 1968 conviction was invalid would not transform his initial sentence into the equivalent of an acquittal of the death penalty for double jeopardy purposes. Therefore, contrary to Petitioner's contention, his resentencing would not constitute a violation of the Double Jeopardy Clause. Moreover, because the state courts determined, after retrial, that the pecuniary gain aggravating factor had been proved, and that it alone outweighed the totality of the mitigation evidence, Petitioner cannot show harm resulting from the courts' application of additional aggravating circumstances based upon the prior conviction.

For the reasons set forth above, Petitioner is not entitled to relief on Claim L.

Claim M: **Pecuniary gain aggravating circumstance is unconstitutional on its face and as applied to Petitioner.**

In its special verdict, the trial court found that the State had proved that Petitioner had "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value" pursuant to the former A.R.S. § 13-454(E)(5) (now § 13-703(F)(5)). (ROA-PCR 225 at 2.) In Claim M, Petitioner alleges that the pecuniary gain factor is unconstitutional on its face and as applied to his sentence. (Dkt. 82 at 60-66.) Petitioner challenges the application of the factor to his sentence on the grounds that the factor underwent a "judicial enlargement" prior to his second trial, thereby violating the Constitution's bar on ex post facto laws. (Id. at 60-61.) Petitioner also claims that the pecuniary gain aggravating factor is vague and overbroad and fails to narrow the class of death-eligible defendants. (Id. at 61-64.) In a related argument, Petitioner contends that the finding of the pecuniary gain factor was arbitrary and capricious because the factor repeats an element of the underlying offense of felony murder. (Id. at 63-64.) Finally, Petitioner contends that application of the factor to his sentence was not supported by sufficient evidence. (Id. at 64-65.) Petitioner's arguments are without merit.

1. Ex post facto violation.

Petitioner alleges that his due process rights were violated because in the interval between his two trials, the Arizona Supreme Court unforeseeably

expanded the scope of the pecuniary gain aggravating factor when it explained, in State v. Clark, 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980), that the factor was not limited in its application to murders committed by "hired guns."[23] On direct appeal, the Arizona Supreme Court rejected Petitioner's ex post facto argument:

> The Clark opinion did not create substantive law, it merely recognized the pre-existing scope of present law. It was not an unforeseeable enlargement nor did it suddenly make lawful conduct unlawful. As in Clark, finding that the defendant committed this crime for pecuniary gain is not a violation of the defendant's due process rights.

Schad III, 163 Ariz. at 420-21, 788 P.2d at 1170-71.

As Petitioner acknowledges, the Ninth Circuit has also rejected this ex post facto argument. Poland v. Stewart, 117 F.3d 1094, 1100 (9th Cir. 1997) ("The reading given to the statute by the Arizona Supreme Court in ... Clark was not unforeseeable, nor an enlargement of the usual and ordinary meaning of the statute."). This Court agrees with the Ninth Circuit that the language of (E)(5), which contains the phrase

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[23] In Petitioner's first trial, the court found that the pecuniary gain aggravating factor was not present. (RT 12/27/79 at 4.) This finding was based solely upon the court's presumption that "the legislative intent [of the pecuniary gain factor] was to cover a contract killing." (Id. at 4-5.) The court noted that if its presumption was incorrect--as it turned out to be, as announced by the holding in Clark--the factor would apply. (Id. at 5.)

"or in expectation of the receipt, of something of pecuniary value," provided fair notice to Petitioner "that his conduct was 'at risk.'" Id.

2. Facial invalidity and double counting.

Petitioner alleges that the pecuniary gain aggravating factor fails to perform the constitutionally-mandated narrowing function and is therefore invalid on its face. Specifically, Petitioner contends that the factor impermissibly fails to "distinguish between a premeditated killing for hire and one where the victim is killed without intent or premeditation during a robbery" and therefore "provides no meaningful basis for distinguishing those few cases in which a death sentence is appropriate from those many cases ... in which it is not." (Dkt. 82 at 61.) Petitioner also argues that the pecuniary gain factor fails to perform a narrowing function, and thus leads to the arbitrary imposition of the death penalty, because it repeats an element of the underlying offense in cases where a defendant is eligible for the death sentence based on a charge of felony-murder involving a robbery.[24] (Id. at 64.)

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[24] The trial court instructed the jury on both premeditated murder and felony murder. (RT 6/27/85 at 1403-04.) The court provided a single verdict form, however, so it is impossible to determine which theory of first-degree murder was the basis of the conviction. Therefore, Petitioner's arguments in these subclaims are based upon the premise that the jury convicted him of felony murder.

On direct review, the Arizona Supreme Court rejected Petitioner's argument that the pecuniary gain factor was unconstitutionally vague. Schad III, 163 Ariz. at 419, 788 P.2d at 1170. By independently reviewing the record and affirming Petitioner's sentence, the supreme court implicitly rejected the argument that the trial court arbitrarily applied the pecuniary gain aggravating circumstance to Petitioner's sentence. (See Dkt. 59 at 16.) Because the supreme court did not provide a rationale for this aspect of its holding, this Court has performed an independent review of the record pursuant to Pirtle v. Morgan, 313 F.3d at 1167. The Court has determined that the ruling of the Arizona Supreme Court upholding the application of the pecuniary gain circumstance to Petitioner's sentence was not objectively unreasonable under controlling federal law.

As Respondents note, Petitioner's arguments are disposed of by the Ninth Circuit's holding in Woratzeck v. Stewart, 97 F.3d 329, 335 (9th Cir.1996). In Woratzeck, the court applied the principles set forth in Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), to conclude that "[f]actor (F)(5) sufficiently channels the sentencer's discretion and does not result in unconstitutionally disproportionate imposition of the death penalty when applied to felony-murder defendants." In reaching this conclusion, the court expressly rejected arguments identical to those raised by Petitioner. Id. at 334-35. First, the court explained that the pecuniary gain factor is constitutionally permissible because it "is not automatically applicable to someone convicted of robbery felony-murder" and therefore "serves to narrow the class of death-eligible

persons sufficiently." Id. at 334. Next, citing State v. Greenway, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991), the Woratzeck court stated that the pecuniary gain factor does not result in double-counting between the elements of a felony murder charge and the pecuniary gain factor because not every felony murder that occurs in the course of a robbery is motivated by pecuniary gain; therefore, the motivation of pecuniary gain must be proven as a fact in addition to the elements of the underlying crime. Id. Finally, the court considered the argument that application of the pecuniary gain factor to a felony-murder charge results in an overbroad and arbitrary imposition of the death penalty. Id. at 335. The Ninth Circuit rejected this argument, offering the following observation:

> That someone who intentionally kills might not be sentenced to death in Arizona does not mean that Woratzeck's death sentence is unconstitutional. If an intentional killing is done for pecuniary gain, then death is also a permitted penalty. Woratzeck's first-degree felony-murder conviction is treated no differently from any first-degree conviction for intentional killing and neither crime alone can result in death absent a finding of one or more aggravating circumstances. The State of Arizona could rationally conclude that a defendant's motive to murder more accurately reflects his relative culpability than whether the murder is done with an affirmative intent to kill or "merely" an utter disregard for whether the victim lives or dies.

Id.

The decision of the Arizona Supreme Court rejecting Petitioner's constitutional challenges to the pecuniary gain factor was neither contrary to nor an unreasonable application of federal law.

3. Insufficient evidence.

Petitioner contends that there was insufficient evidence to show that the murder was committed for pecuniary gain. (Dkt. 82 at 64-66.) He claims that the evidence suggesting he killed the victim for pecuniary gain was circumstantial and susceptible to conflicting interpretations. (Id. at 65-66.)

As noted above, when reviewing a state court's application of an aggravating factor, this Court must determine whether the decision was so arbitrary or capricious as to result in an independent constitutional violation. Lewis v. Jeffers, 497 U.S. at 780, 110 S.Ct. 3092. In carrying out this review, the Court applies the "rational factfinder" standard; i.e., "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found" the aggravating factor to exist. Id. (quoting Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. 2781) (emphasis in Jackson ).

"[A] finding that a murder was motivated by pecuniary gain for purposes of § 13-703(F)(5) must be supported by evidence that the pecuniary gain was the impetus of the murder, not merely the result of the

murder." Moormann, 426 F.3d at 1054. On direct review of this claim, the Arizona Supreme Court rejected Petitioner's argument that there was insufficient evidence to prove that the murder of Mr. Grove was motivated by pecuniary gain:

> Prior to encountering the victim, the defendant was driving a stolen car. He abandoned that car and took the victim's car. He also left the murder scene with the victim's wallet, money, credit cards and ring. This provides strong circumstantial evidence that the purpose of the murder was pecuniary gain. The evidence strongly supports the finding by the trial judge that the aggravating circumstance of pecuniary gain existed in this case.

Schad III, 163 Ariz. at 420-21, 788 P.2d at 1171-72 (citation omitted).

The Court agrees. Based upon the facts proven at the trial, a rational factfinder could have determined that Petitioner murdered Mr. Groves in the expectation of pecuniary gain. See Correll v. Stewart, 137 F.3d 1404, 1420 (9th Cir. 1998); Woratzeck, 97 F.3d at 336. Indeed, despite Petitioner's argument that the evidence could lead to contradictory inferences, it is difficult to ascribe a motivation other than pecuniary gain to the offense against Mr. Grove, who was a complete stranger to Petitioner. Compare State v. Wallace, 151 Ariz. 362, 368, 728 P.2d 232, 238 (1986) (insufficient evidence to support pecuniary gain aggravating factor where defendant's motive was

relationship difficulties with the victim and the taking of money and keys was incidental to the murder).

For the reasons discussed above, Petitioner is not entitled to relief on Claim M.

Claim N: **The trial court failed to consider and give effect to specific mitigating evidence.**

Claim Q: **The Arizona Supreme Court failed to consider, give effect to, and properly weigh mitigation evidence.**

Petitioner alleges that the trial court and the Arizona Supreme Court failed to consider and give effect to the mitigation evidence he presented at sentencing. (Dkt. 82 at 66-80.) The Court disagrees.

1. General principles.

Under the constitution, in capital sentencing proceedings the sentencer must not be precluded from considering relevant mitigation evidence. See Lockett v. Ohio, 438 U.S. 586 (1978). In Lockett and subsequently in Eddings v. Oklahoma, 455 U.S. 104 (1982), the Supreme Court held that under the Eighth and Fourteenth Amendments the sentencer must be allowed to consider, and may not refuse to consider, any constitutionally relevant mitigating evidence. Eddings, 455 U.S. at 113-14. Constitutionally relevant mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604.

However, while the sentencer must not be foreclosed from considering relevant mitigation information, "it is free to assess how much weight to assign to such evidence." Ortiz v. Stewart, 149 F.3d 923, 943 (9th Cir. 1998); see Eddings, 455 at 114-15 ("The sentencer ... may determine the weight to be given relevant mitigating evidence").

On habeas review the federal court does not evaluate the substance of each piece of evidence submitted as mitigation; rather, it reviews the state court record to ensure that the state court allowed and considered all relevant mitigation. See Jeffers v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994) (en banc) (when it is evident that all mitigating evidence was considered, the trial court is not required to discuss each piece of such evidence). As the Ninth Circuit has noted, "the trial court need not exhaustively analyze each mitigating factor 'as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant.' " Moormann, 426 F.3d at 1055 (quoting Clark v. Ricketts, 958 F.2d 851, 858 (9th Cir. 1991)); see Parker v. Dugger, 498 U.S. 308, 314-15, 318 (1991) (the sentencing court properly considered all information, including nonstatutory mitigation, where the court stated that it considered all the evidence and found no mitigating circumstances that outweighed the aggravating circumstances); LaGrand v. Stewart, 133 F.3d 1253, 1263 (9th Cir. 1998); Gerlaugh v. Stewart, 129 F.3d at 1044; Poland v. Stewart, 117 F.3d at 1101.

2. Claim N.

In Claim N, Petitioner contends that the trial court failed to give sufficient weight to four specific mitigating circumstances: (1) Petitioner's abusive, unstable childhood with an alcoholic father; (2) prior to the first trial the prosecution offered Petitioner a plea agreement that included a life sentence; (3) Petitioner's change of character on death row; and (4) the accidental and pleasurable nature of the victim's death in the Utah conviction. Petitioner raised the latter two allegations, (3) and (4), on direct appeal. (Appellant's Opening Brief at 43.) He raised the first two allegations in his preliminary PCR petition (ROA-PCR 245 at 10-11), and the court denied them as procedurally precluded (M.E.3/27/96). Therefore, because the state courts did not reach the merits of allegations (1) and (2), this Court performs a de novo review. Pirtle, 313 F.3d at 1167.

In sentencing Petitioner the trial court found three aggravating circumstances. (ROA-PCR 225 at 1-2.) The court then made findings with respect to statutory and nonstatutory mitigating factors. (Id. at 3-5.) The court indicated that it "considered all matters brought before it, including (without limitation) the pre-sentence report and attachments, the pre-sentence hearing and exhibits admitted at that hearing, the Defendant's sentencing memorandum and the evidence adduced at trial." (Id. at 3.) In his sentencing memorandum and at the sentencing hearing, Petitioner argued and presented extensive testimony regarding the four specific factors cited in Claim N. (ROA-PCR 222 at 23-33; RT 8/22/85.)

The trial court found that Petitioner had not proved any of the statutory mitigating factors. (ROA-PCR 225 at 3-4.) With respect to nonstatutory mitigating circumstances, the court found that Petitioner was a "model prisoner" and that he "shows signs of rehabilitation and of possessing a good, stable character." (Id. at 4.) The court considered Petitioner's character and conduct in prison as "[t]he most persuasive mitigating circumstances." (RT 8/29/85 at 9.) The court also considered Petitioner's "unfortunate childhood" but concluded that it was "not a persuasive mitigating circumstance." (ROA-PCR 225 at 4.) The court explained that it "reject[ed] defendant's argument that the offer of a plea agreement at some time prior to a jury trial and conviction operates to limit the court's sentencing prerogatives." (RT 8/29/85 at 9.) In its assessment of mitigating factors, the court did not explicitly address Petitioner's arguments about the circumstances surrounding the Utah murder conviction. The court concluded by stating that "[n]umerous mitigating circumstances were found to exist" but that "the total mitigation is not sufficient to overcome any one of the aggravating circumstances." (Id. at 10.)

On direct appeal, the Arizona Supreme Court rejected Petitioner's claim "that the trial court erred by failing to consider the defendant's potential for rehabilitation and the circumstances of the Utah murder." Schad III, 163 Ariz. at 421, 788 P.2d at 1172. The court explained:

> A.R.S. § 13-703(E) requires that the trial court "take into account the ... mitigating circumstances" and then determine whether those circumstances are "sufficiently substantial to call for leniency." Mitigating circumstances include "any factors ... which are relevant in determining whether to impose a sentence less than death...." A.R.S. § 13-703(G).
>
> Contrary to the defendant's claim, the trial court did find and consider the defendant's potential for rehabilitation. Nevertheless, the trial court found this to be insufficient to overcome any of the aggravating factors. We also reject the defendant's claim that the circumstances surrounding his prior murder conviction should be considered as a mitigating circumstance because the victim experienced "a pleasurable erotic experience" before he died. While it is clear that the Utah murder did not display the depravity present in the case at bar, the trial court did not find the circumstances of the earlier murder to be mitigating and neither do we.

Id.

The Court agrees that the trial court carried out its constitutional obligation to consider all of the evidence offered in mitigation, including the four factors presented in Claim N. As discussed above, the trial court made specific on-the-record findings with respect to three of the four factors. (ROA-PCR 225 at 3-5; RT 8/29/85 at 6-10.) The court also stated that it

considered all of the mitigation arguments and evidence presented in Petitioner's memorandum and at the sentencing hearing. (ROA-PCR 225 at 3.) Moreover, in its discussion of the prior conviction as an aggravating factor, the court again noted that it "has carefully reviewed all of the testimony and exhibits admitted at the sentencing hearing." (Id. at 2.) The evidence referred to included testimony offered by two witnesses in support of Petitioner's argument that the circumstances of the 1968 murder – i.e., the fact that the victim's death appeared to be the accidental result of auto-erotic asphyxiation which occurred during a consensual sexual encounter – warranted consideration as a mitigating factor. (RT 8/22/85 at 28-33, 39-40, 44-47.) Because the trial court considered all of Petitioner's arguments and evidence in support of mitigation – a key component of which was Petitioner's characterization of the 1968 murder – it is clear that in sentencing Petitioner, the court did consider the circumstances surrounding the prior conviction. The court simply disagreed with Petitioner regarding the import of such information. However, the fact that the court found the evidence "inadequate to justify leniency ... did not violate the constitution." Ortiz, 149 F.3d at 943; see Eddings, 455 at 114-15, 102 S.Ct. 869.

The record indicates, and the Court finds, that the trial court considered all of the mitigation evidence presented by Petitioner, thereby fulfilling the directive set forth in Lockett and Eddings. See Parker, 498 U.S. at 318, 111 S.Ct. 731. In addition, the Court finds that the decision of the Arizona Supreme Court rejecting allegations (3) and (4) was neither contrary to nor an

unreasonable application of clearly established federal law. Petitioner is not entitled to relief on Claim N.

3. Claim Q.

In Claim Q, Petitioner contends that the Arizona Supreme Court, in its independent review of his sentence, failed to consider and give effect to the mitigating circumstances found by the trial court. (Dkt. 82 at 77.) Petitioner raised this claim in his preliminary PCR petition. (ROA-PCR 245 at 12-13.) The court denied the claim as procedurally precluded. (M.E.3/27/96.) Because there is no state court ruling on the merits of this claim, the Court will perform a de novo review. Pirtle, 313 F.3d at 1167

The Arizona Supreme Court detailed the results of its independent review of Petitioner's sentence:

> As is required at this point, we conduct our own independent examination of the record to determine whether the death penalty is properly imposed. State v. Vickers, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981). We note, however, that in 1981 we considered and affirmed the defendant's death penalty. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982).
>
> Our review of the record satisfies us that the state proved that the defendant committed the murder for pecuniary gain. The state also properly established an additional aggravating circumstance arising out of the defendant's prior

> murder conviction. Thus, we find, without question, that there were at least two aggravating circumstances in the present case.
>
> We also conclude that the mitigating circumstances are insufficient to outweigh a single aggravating factor. Although the defendant has continued to show exemplary behavior while incarcerated, we do not find this to be sufficiently substantial to call for leniency. The evidence shows that the defendant strangled to death a 74-year-old man in order to obtain his vehicle and money. At the time the defendant committed this act, he had previously been found criminally responsible for another person's death. The death penalty is appropriate in this case.

Schad III, 163 Ariz. at 421, 788 P.2d at 1172.

Petitioner's argument is based upon the fact that the Arizona Supreme Court, in carrying out its independent review of the sentence, discussed only one mitigating factor, Petitioner's exemplary behavior in prison. (Dkt. 82 at 77-80.) According to Petitioner, the supreme court's failure to discuss additional mitigating circumstances, which had been found or considered and rejected by the trial court, indicated that the court excluded those circumstances from consideration, thereby violating Lockett and Eddings. (Id. at 80.)

In carrying out its habeas review, this Court presumes that "state courts follow the law, even when they fail to so indicate." Jeffers, 38 F.3d at 415; see

Poland, 117 F.3d at 1101. The law required the Arizona Supreme Court to undertake an independent review of Petitioner's sentence, and the court explicitly stated that it carried out "an independent review of the record to determine if the death sentence is properly imposed." Schad III, 163 Ariz. at 421, 788 P.2d at 1172. Nothing in the record overcomes that presumption.

A review of the Arizona Supreme Court's decision also supports a finding that the court undertook a sufficient independent review of the mitigation information contained in the record. For example, the supreme court did not consider and reject only a single mitigating factor; along with Petitioner's good conduct while incarcerated and his potential for rehabilitation, the court addressed Petitioner's arguments regarding the circumstances surrounding the prior murder conviction. Schad III, 163 Ariz. at 421, 788 P.2d at 1172. In doing so, the court directly addressed the two arguments regarding mitigation that Petitioner specifically raised on direct appeal. (Appellant's Opening Brief at 43.) In addition, as Respondents observe, the Arizona Supreme Court acknowledged that "the trial court found several mitigating factors." Id. at 417, 788 P.2d at 1168. In concluding its review of Petitioner's sentence, the supreme court referred to multiple mitigating factors when it stated that "the mitigating circumstances are insufficient to outweigh a single aggravating factor." Id. at 421, 788 P.2d at 1172 (emphasis added). It is clear that the Arizona Supreme Court was aware of the entirety of the mitigation evidence considered by the trial court; by independently reviewing that record, the court necessarily considered such evidence. Contrary to

Petitioner's argument, the supreme court did not exclude any mitigating evidence from its consideration.

Given the presumption that the supreme court followed the law, the court's explicit acknowledgment of its duty to perform an independent review of the record, the court's specific discussion of the mitigating factors raised by Petitioner on direct appeal, and the court's recognition that the trial court had found a number of mitigating circumstances, the Court concludes that the Arizona Supreme Court's review of Petitioner's sentence did not violate Petitioner's rights under Lockett and Eddings. See Moormann, 426 F.3d at 1055; Jeffers, 38 F.3d at 418. Therefore, Petitioner is not entitled to relief on Claim Q.

**Claim O: Petitioner was sentenced in violation of his Due Process and Eighth Amendment rights because the presentence report contained inaccurate information.**

Petitioner alleges that the trial court relied on materially inaccurate information when it sentenced him to death. (Dkt. 82 at 80.) This information was contained in the presentence report, which, according to Petitioner, indicated that his record included three prior felonies, committed from 1959 to 1963, that were in fact misdemeanors. (Id.) Petitioner raised this claim in his supplemental PCR petition. (ROA-PCR 319 at 9-10.) The court rejected the claim. (M.E. 6/21/96 at 2-3.)

A defendant who requests re-sentencing due to the use of inaccurate information at the original sentencing must show both that information before the

sentencing court was inaccurate and that the court relied on the inaccurate information in formulating the sentence. United States v. Tucker, 404 U.S. 443, 447 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948); see Lechner v. Frank, 341 F.3d 635, 638-39 (7th Cir. 2003) (sentencing court demonstrates actual reliance on misinformation in determining sentence when it gives explicit attention to it, bases its sentence at least in part on the information, or gives specific consideration to the information before imposing sentence).

As Respondents note, the trial court relied on only one prior felony as an aggravating factor in sentencing Petitioner, the Utah second-degree murder conviction. In sentencing Petitioner to death, the court did not-and could not-consider the other felonies contained in the presentence investigation because those offenses did not constitute statutory aggravating factors, which, under Arizona's death penalty scheme, are the only factors the court was permitted to consider. In its special verdict, the court gave no indication that it considered the information Petitioner now asserts is inaccurate. (M.E. 8/29/85; ROA-PCR 225.) Because the court did not rely on inaccurate information in sentencing Petitioner, Petitioner is not entitled to relief on Claim O.

Claim P: Ineffective assistance of counsel-sentencing.

Petitioner alleges that counsel was ineffective at sentencing for failing to investigate Petitioner's family background and to present corroborating evidence concerning the nature and effects of his abusive

childhood. (Dkt. 82 at 88.) Petitioner further contends that post-conviction counsel were diligent in developing this claim, and this Court should review the newly developed information he has attached to his habeas filings and hold an evidentiary hearing. (Id. at 89-91.) Respondents counter that the sentencing-stage performance of trial counsel was neither deficient nor prejudicial because counsel did present the mitigating information available at the time of sentencing, and that post-conviction counsel were not diligent in developing the facts Petitioner now proffers. (Dkt. 91 at 63-66.)

1. **Background.**

There is no dispute that trial counsel argued forcefully against a death sentence for Petitioner and that in doing so he raised, among other issues, the mitigating effect of Petitioner's traumatic upbringing.[25] Counsel filed a thirty-nine-page sentencing memorandum that included a section outlining the "emotional harm" caused by Petitioner's abusive childhood. (ROA-PCR 222 at 31-32.) The memorandum referenced the presentence report, which contained a somewhat more detailed account of Petitioner's "stormy childhood" and its impact on Petitioner's

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[25] In his memorandum and at the presentencing hearing, trial counsel emphasized Petitioner's good character, exemplary prison record, and potential for rehabilitation, factors which the trial court accepted as mitigating circumstances. (ROA-PCR 225 at 4). Petitioner also challenged the use of his prior murder conviction as an aggravating circumstance. (ROA-PCR 222 at 2-8; RT 8/22/85 at 28-34, 43-48.)

emotional health and development. (ROA-PCR 223 at 3-4.) The report indicated that Petitioner's father was psychologically unstable and an abusive alcoholic who beat Petitioner with his fists; that Petitioner would accept beatings from his father in order to protect other family members; that at age seventeen he attempted to have his father committed but after his mother withdrew her support from this course of action his father beat him severely; that his father prevented him from engaging socially with others; and that these experiences caused Petitioner to suppress his feelings and spend time away from home, until he left home at age eighteen. (Id.) In the report, however, Petitioner indicated that he did not have any emotional problems. (Id. at 6.) Similarly, at the presentencing hearing, Dr. Bendheim alluded to Petitioner's "deprived" childhood (RT 8/25/85 at 51), but did not indicate that any mental health issues had resulted from that deprivation. Having reviewed this information, the trial court concluded that Petitioner's "unfortunate childhood" was not a "persuasive mitigating circumstance." (ROA-PCR 225 at 4.)

On December 16, 1991, attorney Denise Young filed a preliminary PCR petition. (ROA-PCR 245.) The petition did not include a claim that trial counsel's performance at sentencing was ineffective.[26] (Id.)

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[26] The petition included a claim that the trial court violated Petitioner's rights by rejecting his traumatic upbringing as a mitigating factor. (Id. at 11.) The petition accurately observed that, "Undisputed mitigation evidence was presented that [petitioner] was raised in an abusive, unstable, and alcoholic (Continued)

Petitioner was subsequently represented by attorney John Williams. (M.E.12/19/91). The court ordered Mr. Williams to file a supplemental petition by February 18, 1992 (Id.), but subsequently granted each of Mr. Williams's motions to extend that deadline (M.E. 2/14/92, 3/18/92, 4/17/92, 8/6/92, 10/14/92). On November 3, 1992, Mr. Williams was replaced by attorney Michael Chezem. (M.E.11/3/92.) The court also granted Mr Chezem's motions to extend the time for filing a supplemental PCR petition. (M.E.1/5/93, 2/2/93, 4/14/93, 5/14/93, 6/28/93, 7/30/93, 8/19/93, 9/27/93, 10/25/93, 11/29/93, 12/27/93, 2/1/94.) Mr. Chezem filed a motion seeking the appointment of an investigator, Palmer Investigative Services. (ROA-PCR 263.) On July 30, 1993, the court granted the motion and provided funds for the investigator. (ROA-PCR 264.)

On January 31, 1994, Mr. Chezem withdrew from his representation of Petitioner and was replaced by attorney Rhonda Repp. (ROA-PCR 276.) On February 1, 1994, the court granted Ms. Repp's request for authorization of further investigative services. (M.E.2/1/94.) Ms. Repp moved to extend the deadline for filling a supplemental PCR petition on the grounds that she and the court-appointed investigator had not completed their investigation and located all potential witnesses; the court granted the motions. (M.E.2/16/94, 3/18/94, 4/22/94, 5/24/94, 6/23/94, 7/22/94, 8/30/94,

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family and that petitioner was beaten severely by his father and forbidden to interact with other children." (Id.)

9/27/94, 10/31/94, 11/21/94, 12/28/94, 1/18/95, 2/21/95, 4/20/95.)

On March 28, 1995, more than a year after her appointment, Ms. Repp sought the services of a mitigation expert, Holly Wake (ROA-PCR 301-2.) On July 6, 1995, the court authorized Ms. Wake's appointment. (ROA-PCR 309.)

Ms. Repp then requested additional extensions of the filing deadline for the supplemental petition, which the court again allowed. (M.E.5/22/95, 6/20/95, 7/21/95, 8/22/95, 9/20/95.) On September 20, 1995, the court ruled that no further continuances would be granted. (M.E.9/20/95.) In total, the court granted thirty-four extensions for post-conviction counsel; seventeen of these were requested by Ms. Repp. The court denied Ms. Repp's request for contact visits between Petitioner and Ms. Wake (M.E.11/20/95) and her motion for disclosure of Petitioner's Department of Corrections file (M.E.12/27/95).

On September 26, 1995, the State filed a motion to dismiss the petition with prejudice on the grounds that the amended petition was untimely. (ROA-PCR 315.) In its order denying the motion, the court recounted the history of the PCR proceedings and observed that, "Certainly, during the course of all this time some of the delays were occasioned by extraordinary circumstances." (M.E. 11/20/95 at 2.)

On October 19, 1995, Ms. Repp filed a supplemental PCR petition, alleging, on the basis of "newly discovered" mitigation evidence, that trial

counsel's performance at sentencing had been ineffective. (ROA-PCR 319 at 6-12.) Ms. Repp also sought an evidentiary hearing. (Id. at 1.)

Attached to the supplemental PCR petition was an affidavit prepared by Ms. Wake. (Id., Ex. 2.) In the affidavit, Ms. Wake indicated that she had interviewed Petitioner for four hours and that, based on the information he provided, she concluded that the presentence report "failed to adequately address the seriousness of the abuse [Petitioner] suffered as a child and teenager." (Id. at 3.) However, Ms. Wake's discussion of the new information received from Petitioner added very little to the details set out in the presentence report. (Id.) Ms. Wake reported that Petitioner had "forgotten many of the details surrounding his younger years." (Id. at 2.) Ms. Wake also indicated that she wished to review additional records and interview family members; she acknowledged, however, that in the past Petitioner's family members had proven reluctant to cooperate and difficult to locate.[27] (Id. at 3.)

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[27] In a report dated December 3, 1993, and submitted to Mr. Chezem, Petitioner's investigator indicated that she had located Petitioner's mother in New York state. (Dkt.91, Ex. D.) According to the investigator:

> I contacted Mrs. Hughes, and she stated that she would not tell me where Mr. Schad's siblings were, or how to get in touch with them. All she would say is that Edward was a good boy when he was at home, growing up, and then she hung up on me. I feel that the rest of the family would be hard to find, and even if we did succeed, I do not believe that they would cooperate with us.

(Continued)

On June 21, 1996, without holding a hearing, the court denied the claims presented in the supplemental petition, including the claim that counsel was ineffective at sentencing. The court explained:

> [D]efendant contends that counsel was ineffective for failing to uncover mitigating evidence that might exist. If the mitigation evidence then turns out to be favorable to the defendant, resentencing might be appropriate. Defendant is simply suggesting that it would be a good thing to delve further into defendant's prior convictions and to try once again to talk to family members, etc., etc. Defendant is simply asking to go on a fishing expedition with no showing of what would be turned up that the court did not know at sentencing time and how that might effect [sic] sentencing. This claim has no merit.

(M.E. 6/21/96 at 2-3.)

On July 8, 1996, Ms. Repp filed a motion for rehearing in which she stated, without elaboration, that "mitigation evidence available, but not presented, at [Petitioner's] sentencing hearing would have resulted in a life sentence." (ROA-PCR 341 at 1.) The motion again requested an evidentiary hearing but did not indicate what witnesses would be called or what

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(Id. at 2.)

the nature of the testimony would be. (Id. at 2.) Ms. Repp also filed another declaration by Ms. Wake. (ROA-PCR 342.) Ms. Wake repeated her characterization of trial counsel's mitigation effort as inadequate and described the information in the presentence report as "limited and incomplete." (Id. at 3.) She indicated that "[t]hrough complete interviews, additional information concerning [Petitioner's] abuse has been obtained," but again failed to specify what that information was and did not attach any supporting affidavits or reports. (Id.) The court summarily denied the motion for a rehearing. (M.E.7/24/96.)

2. New information.

In support of Claim P, Petitioner has submitted a number of exhibits that contain information never presented to the state courts. These include an affidavit, dated October 5, 1999, in which Petitioner's mother, Mabel Hughes, recounts her experiences with Petitioner's father, who had been wounded and held as a prisoner of war while serving in Europe during World War II. (Dkt.82, Ex. 4.) According to Mrs. Hughes, Mr. Schad's behavior deteriorated when he returned from overseas; he drank excessively, could not hold a job, and physically abused her; at one point he was committed to a psychiatric ward. (Id.) Mrs. Hughes' affidavit only briefly touches upon Petitioner's childhood and his relationship with his father; she attests that Mr. Schad was "really hard on" Petitioner when he was a small child and that Mr. Schad did not want her to show Petitioner any affection. (Id. at ¶ 28.) She also states that Petitioner had friends when he

was growing up but did not bring them to the house. (Id. at ¶ 29.)

Petitioner has also submitted an affidavit from Lili Deputa, an investigator with the Federal Public Defender's Office in Tucson. (Dkt.82, Ex. 5.) The affidavit is dated July 10, 2000, and recounts a conversation between Ms. Deputa and Petitioner's sister, Susan, that took place in September 1998. (Id. at 1.) According to Ms. Deputa, Ms. Schad described growing up in a poor household where gifts and new clothes were rare; for Christmas the children received one or two presents "at the most." (Id. at 2.) Ms. Deputa reports that Ms. Schad characterized the family as secretive and the parents as "cold and distant" toward the children and toward each other. (Id. at 1-2.) According to Ms. Schad, the parents showed no emotional or physical affection for the children. (Id. at 2.) Ms. Schad also acknowledged her father's severe alcohol problem. (Id.) Ms. Deputa's affidavit also includes information obtained from an interview with Petitioner's aunt, Mr. Schad's sister, who discussed the religious upbringing of her generation of Schads, Mr. Schad's war experiences, and the fact that Petitioner's infant sister died suddenly and her twin brother had a bad eye which went undiagnosed until he started school. (Id. at 4-5.)

Additional new information, provided in support of Claim P, includes employment records of Petitioner's mother (Dkt. 82, Ex. 11), and the Veterans' Administration records of Petitioner's father (id., Ex. 13) and younger brother, Thomas Schad (id., Ex. 12). According to Petitioner, his mother's records indicate

that she was frequently injured and that the treatment for those injuries, which included the prescription of narcotics, affected her parenting ability. (Dkt. 82 at 86-87.) The V.A. records of Petitioner's father show that he returned from overseas suffering from a disabling anxiety disorder and that his mental condition and behavior worsened over the years. (Dkt. 82, Ex. 13.) As documented in the records, however, the most extreme episodes occurred when Petitioner was an adult and out of the home. (Id.) The V.A. records of Thomas Schad, a wounded Viet Nam veteran, indicate that he suffered from post-traumatic stress disorder and alcoholism. (Id., Ex. 12.) Various reports in these records document Thomas Schad's family history; he reported that his father was an alcoholic and had suffered a nervous break-down in 1970; he also indicated that his father was "strict but fair" with respect to discipline, and that his mother, a housewife, was "gentler." (Id.)

In his reply to Respondents' brief on the merits, Petitioner included an affidavit prepared by Dr. Leslie Lebowitz, a clinical psychologist. (Dkt. 98, Ex. K.) The affidavit, dated May 29, 2001, focuses on the mental health of Petitioner's parents. (Id. at 3.) Based upon the sources of information discussed above, and her own interview of the eighty-year-old Mrs. Hughes in 1999, Dr. Lebowitz concluded that Petitioner's family was "profoundly dysfunctional," that his father was "completely disabled" as a parent due to his severe post-traumatic stress disorder and alcoholism, and that his mother was so "disengaged" from her children as to be guilty of criminal neglect. (Id. at 20-21.) According to Dr. Lebowitz, the violence and neglect experienced

by the Schad children left them at a "tremendous disadvantage when faced with the challenges of adult life." (Id. at 22.)

On August 26, 2004, Petitioner filed a notice of supplemental authority. (Dkt.111.) Petitioner attached to the notice a ninety-two-page affidavit prepared by a clinical psychologist, Charles Stanislaw. (Id., Attach.) Dr. Stanislaw prepared a detailed "social history" of Petitioner in support of Petitioner's claim of IAC at sentencing. (Id.) Respondents moved to strike the notice of supplemental authority (Dkt.112); the Court granted the motion with respect to the Stanislaw affidavit (Dkt.114). Petitioner then filed a motion to expand the record (Dkt.115), which Respondents opposed (Dkt.116). The Court denied the motion without prejudice, indicating with respect to the motion to expand the record and the other new information Petitioner has presented, that when the Court addressed the merits of Claim P, it would also make a determination whether Petitioner had diligently attempted to develop the factual basis of the claim in state court. (Dkt.120.)

In his affidavit, Dr. Stanislaw repeats the family background discussed above and offers his opinions concerning the mental health of Petitioner's parents and the effect of their condition, and of other social and economic factors, on Petitioner's psychological development. (Dkt.111, Attach.) He also offers a biography that chronicles Petitioner's education, military service, and criminal activities, and theorizes about the cause of Petitioner's erratic and self-defeating behaviors. (Id.) Dr. Stanislaw concludes that

Petitioner "exhibited many symptoms indicative of a severe and chronic illness. His history of abuse, neglect, and abandonment cannot be ruled out as playing a significant factor in [his] psychiatric and behavioral functioning as an adult." (Id. at 90.)

3. **Analysis.**

The Court concludes that Petitioner has failed to show that the PCR court's denial of his claim of IAC at sentencing was an unreasonable application of federal law. The Court further finds, with respect to Petitioner's attempt to introduce factual information that was not presented to the state court, Petitioner was not diligent in developing these facts. See infra, pp. 82-84. Moreover, the Court finds that even if Petitioner had been diligent and the new materials were properly before the Court, Claim P is without merit.

The right to effective assistance of counsel applies not just to the guilt phase, but "with equal force at the penalty phase of a bifurcated capital trial." Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002) (quoting Clabourne v. Lewis, 64 F.3d at 1378). Trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," and "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Hayes v. Woodford, 301 F.3d 1054, 1066 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 691). To determine whether the investigation was reasonable, the court

"must conduct an objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." Wiggins v. Smith, 539 U.S. at 523 (citation and quotation marks omitted). As the Supreme Court recently reiterated, "In judging the defense's investigation, as in applying Strickland generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made and by giving a 'heavy measure of deference to counsel's judgments.'" Rompilla v. Beard, 545 U.S. 374, 381, 125 S.Ct. 2456, 2462 (2005) (quoting Strickland, 466 U.S. at 689, 691).

With respect to prejudice, the Strickland Court explained that "[w]hen a defendant challenges a death sentence ... the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. In Wiggins, the Court further noted that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." 539 U.S. at 534. The "totality of the available evidence" includes "both that adduced at trial, and the evidence adduced in the habeas proceeding." Id. at 536 (quoting Williams v. Taylor, 529 U.S. at 397-98).

Petitioner has not demonstrated that trial counsel's performance at sentencing was either deficient or prejudicial. Instead, the Court finds that

trial counsel presented a strategically sound case in mitigation and that the information Petitioner now contends should have been presented is not of sufficient weight to create a reasonable probability that, if it had been presented, the trial court would have reached a different sentencing determination.

The focus of trial counsel's attempt to secure a life sentence for Petitioner was the argument that Petitioner, despite the offenses for which he had been convicted, was a changed man who had become "an outstanding prisoner and an outstanding asset to the prison community."[28] (ROA-PCR 222 at 28.) The trial court agreed with counsel's arguments and found that Petitioner's "good, stable character" and status as a "model prisoner" constituted mitigating circumstances. (ROA-PCR 225 at 4.) Petitioner now bases his argument that trial counsel was ineffective on counsel's failure to offer information that is

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[28] As noted previously, another focus of counsel's sentencing-stage strategy was to attack the validity of Petitioner's prior conviction as an aggravating factor. In implementing this strategy, counsel presented the testimony of Stephen Love, an official with the Utah Board of Pardons. (RT 8/22/85 at 22-36.) Mr. Love testified that he believed that Petitioner was wrongfully convicted of murder because the victim's death was accidental and that Petitioner was not a cold-blooded killer. (Id. at 34.) Counsel also elicited substantial testimony from Dr. Bendheim in support of his position that the prior conviction did not qualify as an aggravating circumstance and that Petitioner was not a violent individual. (Id. at 45-49.) This testimony complemented the evidence indicating that Petitioner had a sound character and was worthy of a life sentence.

inconsistent with this presentation of Petitioner as a man who has triumphed over adversity.

For example, as Respondents note in their opposition to Petitioner's motion to expand the record (Dkt. 116 at 12), Dr. Stanislaw's characterization of Petitioner's character and mental health stands in stark contrast to the arguments and information trial counsel presented on his behalf at sentencing. Dr. Stanislaw opines that Petitioner is mentally ill and "has exhibited symptoms of paranoia, anxiety, and mania, and his presentation is complicated by his history of trauma." (Dkt. 111, Attach. at 91.) He "conceals his psychopathology." (Id.) He "displays impoverished speech." (Id.) He "has a pattern of repeating astonishingly self-defeating behaviors." (Id.) According to Dr. Stanislaw, "In addition to manic symptoms, [Petitioner] displays classic signs of chronic depression including a foreshortened sense of future. When not defending against depression with an energized, overly optimistic or manic state, hopelessness and helplessness are evident and appear to overwhelm him by disorganizing his thoughts and speech patterns." (Id.)

At sentencing, counsel presented evidence intended to show Petitioner as a man whose character and capabilities would enable him to benefit society. The evidence included letters and testimony in support of Petitioner from pastors and church members who indicated that Petitioner was a kind, caring, intelligent, articulate, accomplished individual who had "changed his life" and overcome his "miserable childhood." (See ROA-PCR 223; RT 8/22/85 at 80-89,

101-23, 132-53.) In contrast to Dr. Stanislaw's characterization of Petitioner as irremediably damaged by childhood trauma, these individuals portrayed Petitioner as a "solid citizen," "very stable," "in control," "positive," "never despondent," motivated and focused, and an ideal candidate for rehabilitation. (Id.) Dr. Bendheim and John Powers, a social worker at the Utah prison where Petitioner was incarcerated, offered similar testimony. Dr. Bendheim testified that although Petitioner had a "miserable childhood" and was an "unloved child," he had since rehabilitated himself. (RT 8/22/85 at 48, 51). Mr. Powers testified that Petitioner had made "great strides" in dealing with his issues; Petitioner's conduct in prison, supported by the results of psychological tests, indicated to Mr. Powers that his release on parole in 1978 was appropriate. (Id. at 59, 66.) According to Dr. Stanislaw, however, the qualities and accomplishments testified to by these witnesses and noted by Petitioner's supporters-Petitioner's positive influence on other inmates, for instance, and his educational achievements-are nothing more than a "display of inflated self-esteem, grandiosity, and an inflated sense of one's own significance." (Dkt. 111, Attach. at 77.)

Trial counsel's performance cannot be considered deficient for failing to present these opposing versions of Petitioner – i.e., as both rehabilitated and exemplifying a number of personal strengths and virtues which could be used to benefit others, and as an unstable and disoriented individual incapable of

completing a task.[29] Circuit courts have recognized that mental health evidence is a "double-edged sword," and that counsel's decision not to present such information can "exemplif[y] ... reasonable strategic judgment," particularly when counsel focuses his mitigation argument on the defendant's character or amenability to rehabilitation. Truesdale v. Moore, 142 F.3d 749, 754 (4th Cir. 1998) (counsel exercised reasonable strategic judgment by "steer[ing] away from" evidence of organic brain dysfunction, "calculating that it would not help portray [Petitioner] as normal and capable of rehabilitation"); see Glock v. Moore, 195 F.3d 625, 636-40 (11th Cir. 1999) (counsel not ineffective for failing to develop evidence of petitioner's post-traumatic stress disorder related to childhood abuse because, inter alia, presenting such information would have made it "less likely ... the court would have found that he was a good character for rehabilitation"); Bonin v. Calderon, 59 F.3d 815, 834-35 (9th Cir.1995) (reasonable for counsel not to further investigate client's psychiatric condition when counsel made tactical decision to rely on "institutional adjustment" as primary mitigation theory); cf. Gerlaugh, 129 F.3d at 1034 (lay witness testimony regarding petitioner's good character and behavior conflicted with expert testimony that he was a sociopath). Trial counsel's argument that Petitioner was worthy of a sentence less than death based upon a prospective consideration of his positive attributes

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[29] This is true particularly because Petitioner also maintains that the state courts did not place sufficient weight on the positive aspects of Petitioner's present character and state of mind. (Dkt. 82 at 66-80.) See supra, pp. 47-50.

represented a reasonable strategy in mitigation. Counsel's performance was not deficient under Strickland.

The Court further finds that Petitioner has not satisfied Strickland's prejudice prong. Petitioner claims that trial counsel failed to investigate and develop "readily available" information about Petitioner's dysfunctional childhood. (Dkt. 82 at 88.) According to Petitioner, if counsel had located and presented this mitigation evidence, it would have corroborated the information that the trial court heard and rejected. (Id.) The Court disagrees with this characterization of the new material.

The affidavits submitted by family members and psychologists repeat, rather than corroborate or elaborate on, the specific details of abuse included in the presentence report. Despite the volume of additional materials subsequently filed, the information in the presentence report remains the most detailed account of the abuse suffered by Petitioner at the hands of his father. The Court notes, for example, that Dr. Stanislaw, who interviewed Petitioner during two contact visits, does not report any additional information concerning Mr. Schad's violence against Petitioner; instead, when documenting the abuse Petitioner suffered, Dr. Stanislaw frequently relies on the details contained in the presentence report. (Dkt. 111, Attach. at 43, 46, 49-50, 90.)

Much of the remainder of the new material emphasizes the dysfunctional nature of Petitioner's childhood household. The affidavits of Drs. Lebowitz

and Stanislaw include detailed biographies of Petitioner's parents and the affiants' opinions regarding the mental condition of Petitioner's mother as well as his father. Much of this information is speculative and of limited relevance. For example, Petitioner now contends that his mother's parenting ability was impaired because she was often under the influence of narcotics. (Dkt. 82 at 86-87.) This theory appears to be based entirely on a review of Mrs. Hughes's employment records, which date from 1952 to 1981. (Dkt. 98, Ex. K at 20.) In her affidavit, Dr. Lebowitz observes that Mrs. Hughes was prescribed phenobarbital for nervousness resulting from family issues and on numerous occasions received prescriptions for narcotic painkillers. (Dkt. 98, Ex. K at 20.) The records show, however, that Mrs. Hughes was first prescribed phenobarbital in 1959, when Petitioner was seventeen years old, and received her first prescription for a painkiller in 1961. (Dkt.82, Ex. 11.) Based upon this information, there is no evidence that Mrs. Hughes's functioning was impaired by the abuse of narcotics during Petitioner's childhood and adolescence.

Furthermore, the relevance of information concerning Petitioner's troubled childhood and the parenting deficiencies of his mother and father must be taken in context with the fact that Petitioner was thirty-six years old when he killed Mr. Grove, and had been out of the parental home for some eighteen years. Prior to 1978, Petitioner had served two terms in the Army and had lived overseas. (ROA-PCR 223 at 7.) While serving his sentence for the 1968 murder he had established a record as a model prisoner and gained

the trust of prison officials who recommended parole on the grounds that Petitioner had addressed his psychological issues and did not represent a threat to society. (RT 8/22/85 at 59-67.) Petitioner's age and life experience attenuates any causal connection between Petitioner's dysfunctional childhood and the 1978 murder. See State v. Djerf, 191 Ariz. 583, 598, 959 P.2d 1274, 1289 (1998) ("Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior"); State v. Newell, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006) (lack of a "nexus" between the mitigating factor and the crime "may be considered in assessing the quality and strength of the mitigation evidence"). For these reasons, Petitioner was not prejudiced by counsel's failure to present additional information describing the nature of Petitioner's traumatic childhood.

Finally, while the Court notes that the new materials, particularly the affidavit of Dr. Stanislaw, offer a more elaborate explanation of the psychological effect of Petitioner's childhood experiences, this information is either cumulative or, as discussed above, contradictory to the portrait of Petitioner that trial counsel presented at sentencing. The presentence report presented uncontradicted evidence from a credible source that Petitioner experienced severe childhood abuse and that the abuse affected his social and emotional development. (ROA-PCR 223 at 3-4.) The trial court considered this evidence but found it "unpersuasive" in terms of mitigation and ultimately sentenced Petitioner to death. (ROA 225 at 4.) Petitioner has not shown a reasonable probability that

the court's decision would have been different if trial counsel had presented additional evidence expanding the scope of Petitioner's claim of childhood abuse and neglect and analyzing Petitioner as "self-defeating" and "mentally ill." (Dkt. 111, Attach. at 90, 91.) The Court does not find such an approach was more likely to have achieved success than the strategy trial counsel actually employed.

The trial court denied Petitioner's claim that counsel was ineffective at sentencing. (M.E.6/21/96.) In support of this claim, Petitioner has submitted additional factual materials that were not presented to the state court. Despite Petitioner's failure to develop these facts in state court, the Court has considered these materials and concludes that the trial court's denial of Petitioner's sentencing-stage IAC claim was not an unreasonable application of clearly established federal law as set forth in Strickland. Petitioner is not entitled to relief on Claim P.

Claim R: **The Arizona Supreme Court's failure to conduct a proper proportionality review violated Petitioner's right to due process.**

Petitioner argues that the proportionality review conducted in his case "fell below the most minimal standards of due process-without reliable sources of information, without standards, without rules, and without notice of the issues, and even without the personal participation of the Justices who were supposed to be conducting it." (Dkt. 82 at 91.) Petitioner raised this claim in his PCR petition (ROA-

PCR 245 at 13-14), and the court PCR court denied it as procedurally precluded (M.E.3/27/96).

There is no federal constitutional right to proportionality review of a death sentence. McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (citing Pulley v. Harris, 465 U.S. 37, 43-44 (1984)). Nevertheless, at the time of Petitioner's direct appeal, it was the stated practice of the Arizona Supreme Court to undertake a proportionality review of all capital sentences,[30] and the court did so with respect to Petitioner's sentence:

> After considering the defendant's claims of error, we make an independent review to determine whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. Richmond, 136 Ariz. at 321, 666 P.2d at 66. We compare the defendant and his crime to those cases where the death penalty was properly imposed because the crime was committed in a manner raising it above "the norm" of first degree murders, or the defendant's background places him above "the norm" of first degree murderers. State v. Blazak, 131 Ariz. 598, 604, 643 P.2d 694, 700, cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). We also compare the defendant and his crime to those cases where we have lessened the penalty imposed to life imprisonment. State v. McCall,

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[30] The state court discontinued proportionality reviews in 1992. State v. Salazar, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992).

139 Ariz. 147, 162, 677 P.2d 920, 935 (1983), cert. denied, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984).

There are numerous instances where we have upheld the imposition of the death penalty when the murder was committed for pecuniary gain. State v. LaGrand, 152 Ariz. 483, 733 P.2d 1066, cert. denied, 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987); State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984); State v. Blazak, 131 Ariz. 598, 643 P.2d 694, cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982); State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982). We have also upheld the death penalty in cases where the defendant had prior convictions punishable by life imprisonment. State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988); State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986); State v. Bracy, 145 Ariz. 520, 703 P.2d 464 (1985), cert. denied, 474 U.S. 1110, 106 S.Ct. 898, 88 L.Ed.2d 932 (1986); State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984).

In contrast, we have reduced a defendant's death penalty sentence to life imprisonment where we have found insufficient evidence to support the aggravating circumstances. State v. Johnson, 147 Ariz. 395, 710 P.2d 1050 (1985). We have also reduced the defendant's sentence where the defendant was mentally impaired, State v. Graham, 135 Ariz. 209, 660 P.2d 460

(1983), or very young when he committed the crime. State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982).

Nothing in the present case leads us to consider that death is a disproportionate punishment. The defendant does not fall within any of the cases where we have reduced the death penalty to life imprisonment. We find nothing in the record otherwise making his sentence disproportionate. The defendant does, however, fall within those cases where the death sentence was properly imposed. Thus, the imposition of the death penalty is justified.

Schad III, 163 Ariz. 422-23, 788 P.2d at 1173-74.

While conceding that there is no constitutional right to proportionality review, Petitioner argues that the Arizona Supreme Court, by instituting the practice of reviewing the proportionality of death sentences, must carry out the practice in accord with the Due Process Clause by providing notice, an opportunity to be heard, and objective guidelines. (Dkt. 82 at 91-93.)

The Ninth Circuit rejected this argument in Ceja v. Stewart, 97 F.3d 1246, 1252 (9th Cir. 1996). In Ceja, the petitioner argued that the Arizona Supreme Court had created a liberty interest in proportionality review, which the court violated when it failed to undertake such a review of his death sentence. Id. The Ninth Circuit denied the claim, holding that the interest implicated by proportionality review-the "substantive right to be free from a disproportionate

sentence"-was protected by the application of "adequately narrowed aggravating circumstance[s]." Id. In the present case, in contrast to Ceja, the supreme court did conduct a proportionality review, in addition to applying Arizona's properly narrowed statutory aggravating factors.

Petitioner has not shown that the supreme court carried out its proportionality analysis in bad faith. See Walton v. Arizona, 497 U.S. 639, 655-56 (1990), overruled on other grounds by Ring v. Arizona, 536 U.S. 584 (2002) (if a proportionality review was conducted in good faith, the Constitution does not require a federal court to look behind the state court's conclusion). It is not a proper function of this Court to review a state court's decision on proportionality. Lewis v. Jeffers, 497 U.S. at 779 (court of appeals erred in conducting a de novo, case-by-case comparison of state cases); see also LaGrand, 133 F.3d at 1263; Gerlaugh, 129 F.3d at 1044-45; Martinez-Villareal v. Lewis, 80 F.3d 1301, 1308-09 (9th Cir.1996). Petitioner is not entitled to relief on Claim R.

**Claim U: Inadequate standard for weighing aggravating and mitigating standards.**

In its procedural status order the Court indicated that it would consider the merits of the following properly exhausted allegation of Claim U: that Arizona's death penalty statute and case law fail to establish an objective standard to guide the discretion of the sentencing judge in weighing aggravating and mitigating factors and determining whether to impose a sentence of death. (Dkt. 59 at 16-

17.) Petitioner's brief fails to address this claim (see Dkt. 82), and the Court finds it meritless.

The Arizona Supreme Court addressed and rejected this claim on direct appeal. Schad III, 163 Ariz. at 422, 788 P.2d at 1173. This decision was neither contrary to nor an unreasonable application of clearly established federal law. Courts have consistently upheld the validity of Arizona's death penalty scheme. See Lewis v. Jeffers, 497 U.S. at 774-77; Walton v. Arizona, 497 U.S. at 649-56; Smith v. Stewart, 140 F.3d 1263, 1272 (9th Cir.1998); Woratzeck v. Stewart, 97 F.3d at 335; Chaney v. Lewis, 801 F.2d 1191, 1195 (9th Cir.1986). Petitioner is not entitled to relief on Claim U.

**Claim AA:** Ineffectiveness of appellate counsel.

Petitioner alleges that appellate counsel was ineffective in violation of Petitioner's rights under the Sixth and Fourteenth Amendments. (Dkt. 82 at 95-106.) Without addressing Petitioner's specific allegations of appellate counsel's IAC, the PCR court denied this claim, finding that counsel's decision not to raise certain issues on appeal was "strategic" and that Petitioner had failed to show that counsel's performance was either deficient or prejudicial. (M.E. 6/21/96 at 2.)

The Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 396 (1985). A claim of ineffective assistance of appellate counsel is reviewed according to the standard

set out in Strickland. See Miller v. Keeney, 882 F.2d 1428, 1433-34 (9th Cir.1989). Under Strickland, Petitioner must show that counsel's appellate advocacy fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's deficient performance, Petitioner would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285-86 (2000); see Miller, 882 F.2d at 1434 n.9 (citing Strickland, 466 U.S. at 688, 694).

"A failure to raise untenable issues on appeal does not fall below the Strickland standard." Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002); see also Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) (appellate counsel could not be found to have rendered ineffective assistance for failing to raise issues that "are without merit"); Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985). Moreover, appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by a petitioner. Miller, 882 F.2d at 1434 n.10 (citing Jones v. Barnes, 463 U.S. 745, 751-54 (1983)); see Smith v. Stewart, 140 F.3d at 1274 n. 4 (counsel not required to file "kitchen-sink briefs" because doing so "is not necessary, and is not even particularly good appellate advocacy"). Courts have frequently observed, as the PCR court did here (M.E. 6/26/96 at 2), that the "weeding out of weaker issues is ... one of the hallmarks of effective appellate advocacy." Miller, 882 F.2d at 1434; see Smith v. Murray, 477 U.S. 527, 536 (1986). Therefore, even if appellate counsel declines to raise weak issues, counsel will likely remain above an objective standard of competence and will have caused no prejudice. Id.

In addition to satisfying both prongs of the Strickland standard, under the AEDPA Petitioner must make the additional showing that the PCR court's denial of his claims of ineffective assistance of appellate counsel was contrary to or an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1).

On direct appeal, appellate counsel raised thirteen issues. (Appellant's Opening Brief.) In his merits brief, Petitioner claims that "appellate counsel failed to provide ... vigorous and effective advocacy in five areas." (Id. at 96.) Applying the principles discussed above, the Court concludes that the underlying claims lack merit and therefore the Court rejects Petitioner's contention that appellate counsel's failure to raise the issues that follow constituted IAC.

1. **Right to present a defense.**

As discussed above, trial counsel moved for the appointment of Dr. Bendheim to perform a "psychiatric autopsy" of Mr. Grove. (ROA-PCR 156.) The trial court denied the motion. (M.E.6/14/85.) Counsel also sought to introduce Mr. Grove's medical records. (RT 6/27/85 at 1320-21.) The trial court granted the state's motion to exclude the records. (Id. at 1323-24.) Appellate counsel did not challenge these rulings on direct appeal.

To satisfy the prejudice prong of Strickland, Petitioner must show that if appellate counsel had challenged the trial court's ruling with respect to evidence of the victim's mental health, there was a

reasonable probability that he would have prevailed on appeal. Miller, 882 F.2d at 1433-34. Petitioner cannot satisfy this burden, because the Arizona Supreme Court has ruled that the type of information trial counsel sought to put before the jury is not admissible. In State v. Montijo, 160 Ariz. 576, 577-78, 774 P.2d 1366, 1367-68 (1989), the defendant, convicted of negligent homicide, argued on appeal that the trial court erred in precluding expert testimony regarding a "psychiatric autopsy" of the victim, which the defendant had sought to introduce to support his theory that he had acted in self-defense.[31] The supreme court upheld the trial court's ruling on the grounds that "the proposed testimony was not a proper subject of expert testimony." Id. at 580, 774 P.2d at 1370. The court noted that its precedent "distinguished between general information about a character or behavioral trait and a particularized opinion about how that trait was manifested in the case at trial." Id. The court then explained that "[t]he psychiatric autopsy in this case far transgressed this line. It sought to inform the trier not only about decedent's character *but what decedent did and why he did it on the night of his death.* It was properly rejected." Id. (emphasis added).

The information trial counsel sought to introduce at Petitioner's trial through Dr. Bendheim's

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[31] This "autopsy" report purported to show that the victim was a violent, troubled, sexually aggressive substance abuser with a low IQ, "the type of person who dies prematurely by provoking his own death." Montijo, 160 Ariz. at 579, 774 P.2d at 1369.

research and testimony similarly constituted an effort to show what Mr. Grove did at the moment of his death-committed suicide-and why he did it. The information was not admissible under Arizona Supreme Court precedent. Therefore, the trial court's decision to exclude the evidence was correct, and appellate counsel's decision not to raise a meritless issue on appeal cannot form the basis for a claim of IAC.

Petitioner relies on Beaver v. Hamby, 587 F.Supp. 88 (M.D.Tenn. 1983), to support his argument that psychiatric autopsies are admissible and therefore appellate counsel was deficient for failing to appeal the trial court's rulings to the contrary. (Dkts. 82 at 98, 98 at 76.) In Beaver, however, the district court did nothing more than offer a brief allusion to the fact that at trial the defense presented testimony by an expert who had performed a psychiatric autopsy of the victim; because such evidence had been placed before the jury, the district court rejected the habeas petitioner's challenge to the trial court's exclusion of additional evidence concerning the victim's state of mind. 587 at 91. The district court did not consider, let alone endorse, the propriety of admitting the results of a psychiatric autopsy. Its holding does nothing to advance Petitioner's IAC claim.

2. Removal of jurors.

he trial court, sua sponte, excused six jurors on the grounds that they were hearing-impaired. (RT 6/18/85 at 84-85, 92, 94, 108-09.) Petitioner argues that the court did not make further inquiries or pursue

alternate means of accommodating the jurors. (Dkt. 82 at 100-01.) The court also dismissed a juror, Larry Reed, after learning that his siblings had experienced legal troubles. (RT 6/19/85 at 210.) The court interviewed Mr. Reed, who indicated that, based upon the unfair manner in which the authorities had treated his relatives, he would "probably go for the defendant" and would "go one sided." (Id. at 209.) Petitioner argues that the court's "summary" removal of Mr. Reed "denied Petitioner the opportunity to inquire into what Mr. Reed's statements actually meant." (Dkt. 82 at 101.) Trial counsel did not object to the court's dismissal of these jurors, and he approved of the panel at the conclusion of voir dire. (RT 6/19/85 at 218.)

Petitioner contends that the court's dismissal of these jurors violated his right to a jury composed of a fair cross-section of the community and his right to a fair and impartial jury, and that appellate counsel's failure to raise the issue on appeal constituted IAC. (Dkt. 82 at 102.)

A review of the Arizona Supreme Court's holdings in this area indicates that appellate counsel did not perform ineffectively by failing to pursue this issue on appeal. The supreme court has held that while a defendant is entitled to a fair and impartial jury, "he is not entitled to be tried by any particular jury; therefore, unless the record affirmatively shows that such a fair and impartial jury was not secured, the conviction must be affirmed." State v. Arnett, 119 Ariz. 38, 50, 579 P.2d 542, 554 (1978); see State v. Doerr, 193 Ariz. 56, 65, 969 P.2d 1168, 1177 (1998). In Arnett, the court further explained that "the matter of

excusing jurors is committed to the sound discretion of the trial judge, and in the absence of a clear and prejudicial abuse of that discretion, his action will not be disturbed on appeal; this is so even where the judge acts on his own motion." Id.; see State v. Dickens, 187 Ariz. 1, 15, 926 P.2d 468, 482 (1996). Finally, the Arnett court noted that "appellant waived any objection in this regard, both by failing to object at the time of the excusal, and by expressly approving the panel at the conclusion of voir dire." Id. (citations omitted); see State v. Milke, 177 Ariz. 118, 122, 865 P.2d 779, 783 (1993).

Nothing in the record affirmatively shows that Petitioner was denied a fair and impartial jury or that the trial court clearly and prejudicially abused its discretion in excusing the jurors. These facts, together with counsel's waiver of any objections, render untenable any argument that Petitioner's rights were violated by the trial court's dismissal of the jurors. Because appellate counsel is not obligated to raise untenable issues, his failure to do so here does not constitute IAC.

3. Jury instructions.

Petitioner claims that counsel erred by failing to raise as an appellate issue an alleged error in the jury instructions. (Dkt. 82 at 102-03.) The trial court instructed the jury that the malice element of murder could be inferred from the use of a deadly weapon; the

court did not provide a definition of "deadly weapon."[32] (RT 6/27/85 at 1403-04.) Defense counsel did not object to this portion of the instruction. (RT 6/27/85 at 1338.) According to Petitioner, the failure to provide a definition of "deadly weapon" was an error that violated his right to due process, a fair trial, and a reliable sentencing determination. (Dkt. 82 at 102.) The Court disagrees.

First, it is noted that the instruction provided by the trial court comported with the murder instruction approved on numerous occasions by the Arizona Supreme Court. See, e.g., State v. Bishop, 144 Ariz. 521, 522-23, 698 P.2d 1240, 1241-42 (1985); State v. Lujan, 124 Ariz. 365, 370-71, 604 P.2d 629, 634-34 (1979).

Moreover, because defense counsel did not object at trial, the issue was waived on appeal unless the court's failure to define "deadly weapon" constituted fundamental error. State v. Valles, 162 Ariz. 1, 6, 780 P.2d 1049, 1054 (1989); see State v. Zaragoza, 135

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[32] The court instructed the jury, in relevant part:

> Murder is the unlawful killing of a human being with malice. The thing that distinguishes murder from all other killings is malice. There are two kinds of malice. A person has one kind of malice when he deliberately intends to kill. If you determine that the defendant used a deadly weapon in the killing, you may find malice. If you determine that the defendant had no considerable provocation for the killing, you may find malice.

(RT 6/27/85 at 1403.)

Ariz. 63, 66, 659 P.2d 22, 25 (1983) (noting that convictions are rarely overturned on the basis of an improper instruction to which no objection was made at trial) (citing Henderson v. Kibbe, 431 U.S. 145, 154 (1977)). In Valles, the Arizona Supreme Court explained that "a court need not define every phrase or word used in the instructions" and that "[w]hen the words are used in their ordinary sense and are commonly understood by those familiar with the English language, the court need not define those terms." Id. The court then found that "deadly weapon" was a term with a commonly understood meaning, noting that "the statutory definition of deadly weapon and the common definition are essentially the same." Id. at 6-7, 780 P.2d at 1054-55. The supreme court concluded, therefore, that the trial court's failure to define "deadly weapon" in its jury instructions did not constitute fundamental error. Id.

Appellant had no duty to raise a meritless challenge to the murder instruction on direct appeal; therefore, his failure to do so did not constitute IAC.

4. **Right to be present.**

Petitioner claims that counsel was ineffective for failing to raise as an appellate issue the fact that Petitioner was not present when defense counsel moved for a mistrial during an in-chambers meeting and when the court and counsel settled the jury instructions. (Dkt. 82 at 103-04.)

"[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is

critical to its outcome if his presence would contribute to the fairness of the procedure." Kentucky v. Stincer, 482 U.S. 730, 745 (1987). As the Arizona Supreme Court explained, however, a defendant's right to be present extends "only to those proceedings in open court 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" State v. Christensen, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981) (citation omitted); see State v. Dann, 205 Ariz. 557, 571, 74 P.3d 231, 245 (2003) (noting that "the right does not extend to in-chambers pretrial conferences ... and various other conferences characterized as relating only to the resolution of questions of law") (citation omitted).

At defense counsel's request, an in-chambers conference occurred on the morning of June 21, 1985, prior to the day's trial proceedings. At the meeting, defense counsel, citing improprieties in a previous witness's testimony, moved for a mistrial and raised several other evidentiary issues. (RT 6/21/85 at 612-23.) Counsel waived Petitioner's presence. (Id. at 623.)

Petitioner argues that counsel could not validly waive Petitioner's right to be present at the meeting. (Dkts. 82 at 103-04, 98 at 82.) The Court disagrees. In State v. Collins, 133 Ariz. 20, 23, 648 P.2d 135, 138 (1982), the Arizona Supreme Court held that counsel may waive a defendant's right to be present at trial proceedings, even those involving issues that are not "wholly legal" in nature, and that "the trial court may rely on counsel's waiver without requiring personal waiver by the defendant." The Court also finds that the proceeding involved the resolution of purely legal

matters and therefore did not affect Petitioner's right to be present.

On June 27, 1985, the court and counsel gathered outside of Petitioner's presence "to make a record ... on the [jury] instructions." (RT 6/27/85 at 1335.) Defense counsel did not comment on or object to Petitioner's absence during the brief meeting. (Id. at 1335-44.)

The Court finds that this proceeding also involved wholly legal matters. At the brief meeting, the judge informed counsel which instructions he would read to the jury and counsel made a record of their objections. (Id.) Petitioner "could have contributed nothing" to this legal discussion and cannot show "that his presence *951 would have made any difference." State v. Schackart, 190 Ariz. 238, 255, 947 P.2d 315, 332 (1997); see Stincer, 482 U.S. at 745. Therefore, Petitioner's absence from the meeting did not constitute a violation of his constitutional rights.

The argument that Petitioner's right to be present was violated in these instances is without merit. Appellate counsel's failure to raise the issue did not constitute IAC.

5. Cruel and unusual punishment.

Petitioner contends that appellate counsel was ineffective because he failed to argue that Petitioner's death sentence constituted cruel and unusual punishment. (Dkt. 82 at 105-06.) As the basis for this proposed argument, Petitioner cites the lack of

evidence of his guilt and the strength of the evidence in mitigation. (Id.)

This claim is without merit. On direct appeal, counsel raised eleven separate claims attacking Petitioner's death sentence. (Appellant's Opening Brief.) These included a challenge to the trial court's findings in aggravation and mitigation (id. at 22-34) and claims that Arizona's death penalty scheme constitutes cruel and unusual punishment in violation of the Eighth Amendment (id. at 35-38, 55). The Arizona Supreme Court rejected these claims. Schad III, 163 Ariz. at 417-23, 788 P.2d at 1168-74.

Petitioner has failed to demonstrate that appellate counsel was ineffective for failing to raise an additional challenge to Petitioner's sentence on the grounds that his conviction was supported by insufficient evidence, especially given the fact that the Arizona Supreme Court had already held that the evidence was sufficient to support a murder conviction. Schad I, 129 Ariz. at 572, 633 P.2d at 381; see Schad III, 163 Ariz. at 420-21, 982 P.2d at 1171-72 (discussing sufficiency of evidence supporting the pecuniary gain aggravating factor).

The Court concludes that Petitioner has not shown that the performance of appellate counsel was either deficient or prejudicial. Therefore, the PCR court's denial of Petitioner's claim of appellate counsel IAC was neither contrary to nor an unreasonable application of federal law. Petitioner is not entitled to relief on Claim AA.

## EVIDENTIARY DEVELOPMENT

### 1. Background.

Petitioner seeks to present, through an evidentiary hearing and the introduction of various affidavits, evidence that was not considered by the state court. Petitioner requests an evidentiary hearing with respect to Claims A, I, J, P, R, and AA.[33] (See Dkt. 82.) As noted above, Petitioner also filed a motion seeking to expand the record, attached to which was Dr. Stanislaw's affidavit. (Dkt.115.) In addition, Petitioner's merits brief and reply include affidavits containing factual material that was not presented to the state court. (Dkts.82, 98.) Petitioner contends that he is entitled to an evidentiary hearing and to the consideration of the new materials because he pursued the factual basis of the relevant claims through the exercise of due diligence in state court. The Court disagrees.

In evaluating Petitioner's requests, the Court must apply the relevant provisions of 28 U.S.C. § 2254(e)(2):

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

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[33] The Court has already addressed and denied Petitioner's request for an evidentiary hearing with respect to Claim B. Supra, pp. 19-21.

(A) the claim relies on –

. . .

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[34]

Section 2254(e)(2) similarly limits a petitioner's ability to present new evidence through a motion to expand the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases.[35] See Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005) (holding that the conditions of § 2254(e)(2) generally apply to petitioners seeking relief based on new

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[34] Petitioner does not argue, pursuant to § 2254(e)(2)(A)(i), that a new retroactive rule of constitutional law applies to his claims.

[35] Rule 7 authorizes a federal habeas court to expand the record to include additional material relevant to the determination of the merits of a petitioner's claims. "The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath, to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record." Rule 7(b), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254.

evidence, even when they do not seek an evidentiary hearing) (citing Holland v. Jackson, 542 U.S. 649, 652-53 (2004) (per curiam)).

As interpreted by the United States Supreme Court, the restrictions of subsection (e)(2) apply only if the failure to develop a claim's factual basis is due to a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams v. Taylor, 529 U.S. 420, 432 (2000). "The purpose of the fault component of 'failed' is to ensure the prisoner undertakes his own diligent search for evidence." Id. at 435, 120 S.Ct. 1479. The Court found that this rule served the AEDPA's goal of furthering comity in that "federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." Id.; see also Cardwell v. Netherland, 971 F.Supp. 997, 1008 (E.D. Va. 1997) ("Ordinarily, a § 2254 petition is limited to the factual record developed in state court proceedings"), aff'd Cardwell v. Greene, 152 F.3d 331 (4th Cir.1998), overruled on other grounds, Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000). Thus, subsection (e)(2) allows factual development when a petitioner diligently attempts to develop the factual basis of a claim in state court and is "thwarted, for example, by the conduct of another or by happenstance was denied the opportunity to do so." Williams, 529 U.S. at 432; see Baja v. Ducharme, 187 F.3d 1075,1078-79 (9th Cir. 1999).

In compliance with § 2254(e)(2), when the factual basis for a particular claim has not been fully developed in state court, the first question for a district

court in evaluating whether to grant an evidentiary hearing is whether the petitioner was diligent in attempting to develop its factual basis. See Baja, 187 F.3d at 1078 (quoting Cardwell, 152 F.3d at 337). The Supreme Court has set an objective standard for determining "diligence": whether the petitioner "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Williams, 529 U.S. at 435. For example, when there is information in the record that would alert a reasonable attorney to the existence and importance of certain evidence, the attorney "fails" to develop the factual record if he does not make reasonable efforts to investigate and present the evidence to the state court. See id. at 438-40, 120 S.Ct. 1479 (counsel lacked diligence because he was on notice of possibly material evidence and conducted only a cursory investigation); Alley v. Bell, 307 F.3d 380, 390-91 (6th Cir. 2002) (lack of diligence because petitioner knew of and raised claims of judicial bias and jury irregularities in state court, but failed to investigate all the factual grounds for such claims).

Absent unusual circumstances, diligence requires "that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." Williams, 529 U.S. at 437; see Bragg v. Galaza, 242 F.3d 1082, 1090 (9th Cir.2001), amended on denial of reh'g, 253 F.3d 1150 (9th Cir. 2001) ("inactions show[ed] insufficient diligence" on ineffective counsel claim where petitioner did not request an evidentiary hearing and brought claim only on appeal rather than in a collateral proceeding). However, the mere request for an evidentiary hearing

may not be sufficient to establish diligence if a reasonable person would have taken additional steps. See Dowthitt v. Johnson, 230 F.3d 733, 758 (5th Cir. 2000) (petitioner requested hearing but was not diligent because he failed to present affidavits of family members that were easily obtained without court order and with minimal expense); see also Koste v. Dormire, 345 F.3d 974, 985-86 (8th Cir. 2003) (lack of diligence despite hearing request because petitioner made no effort to develop the record or assert any facts to support claim that his counsel was ineffective for knowing of and failing to investigate his psychiatric condition), cert. denied, 541 U.S. 1011 (2004). If an evidentiary hearing is requested, a petitioner's inability to persuade a state court to conduct such a hearing does not in itself demonstrate lack of diligence. See Cardwell, 152 F.3d at 338.

If the Court determines that Petitioner has not been diligent in establishing the factual basis for his claims in state court, the Court may not conduct a hearing unless Petitioner satisfies one of the narrow exceptions set forth in § 2254(e)(2). These exceptions do not apply to Petitioner's claims; Petitioner does not argue that the factual predicate of the claims could not have been previously discovered or that the facts underlying the claims are sufficient to establish by clear and convincing evidence that, but for the constitutional error, no rational factfinder would have found him guilty. Therefore, if Petitioner cannot show that he pursued the claims with due diligence in state court, he is not entitled to a hearing or to expansion of the record.

Finally, with respect to claims that were diligently developed in state court, and which are not subject to the strictures of § 2254(e)(2), a petitioner is entitled to an evidentiary hearing on a claim where the facts are in dispute if he has alleged facts that, if proven, would entitle him to relief, and he did not receive a full and fair evidentiary hearing in state court. Silva v. Woodford, 279 F.3d at 853.

The Court has previously described the history of Petitioner's collateral attack on his conviction in state court. See supra at pp. 54-57. Based upon that record, the Court concludes that Petitioner was not diligent in developing the factual bases of his claims, despite being afforded an opportunity to do so during collateral proceedings that stretched over a period of nearly five years.

2. **Motions discussion.**

Applying the principles discussed above, the Court evaluates Petitioner's requests for an evidentiary hearing and expansion of the record.

Claims A and I: In his supplemental PCR petition, Petitioner argued that newly discovered evidence, in the form of an affidavit by Duncan's ex-wife, supported his contention that Duncan was acting as an agent of the police when he spoke with Petitioner. (ROA-PCR 319, Ex. 2.) The Court has resolved this aspect of Claim A by determining that Petitioner's right to counsel had not attached; therefore, additional evidence regarding Duncan's alleged status as a police agent is not relevant.

With respect to the remainder of Claim A and Claim I, alleging a Brady violation and prosecutorial misconduct, Petitioner seeks an evidentiary hearing "at which [he] can discover and present all the undisclosed incentives provided by the prosecution to Duncan." (Dkt. 82 at 38.) Petitioner did nothing to develop the factual predicate of this claim in state court. He did not raise this claim on direct appeal, and his PCR petitions do not include an allegation that the State failed to disclose impeachment materials regarding Duncan. Therefore, Petitioner did not exercise due diligence in developing the claim in state court, and he is precluded from obtaining an evidentiary hearing before this Court.

Claim J: Claim J alleges two areas of IAC by trial counsel: (1) failure to locate Duncan's wife and (2) failure to move for reconsideration of the court's refusal to appoint Dr. Bendheim to examine the victim's mental health, along with a failure to make a proper proffer of the victim's medical records. (Dkt. 82 at 38-50.)

In his preliminary PCR petition, Petitioner raised the issue of ineffectiveness with respect to Dr. Bendheim's appointment and the victim's medical records. (ROA-PCR 245 at 9-10.) He sought an evidentiary hearing, but presented no affidavits or other information in support of the factual basis of the claim. (Id.) In his supplemental PCR petition, he argued that trial counsel was ineffective for failing to locate Duncan's ex-wife (ROA-PCR 319 at 9-10); he moved for an evidentiary hearing and presented an

affidavit from Sprayberry (Id., Ex. 2). In a supplemental filing he included an affidavit from his investigator indicating that she had been able to locate Sprayberry with no difficulty. (ROA-PCR 337.) Finally, to supplement his motion for rehearing, Petitioner presented an affidavit from trial counsel, who indicated that he had been unable to locate Sprayberry and that his failure to call her as a witness was not a strategic decision. (ROA-PCR 344.) The state court considered this information and rejected it as a basis for a claim of IAC. (M.E. 6/21/96 at 2.)

Petitioner has not offered additional information to support this aspect of Claim J. Therefore, based upon this record, even a finding that Petitioner was diligent in developing the factual predicate of the claim would not entitle him to an evidentiary hearing. To the extent that there is a dispute regarding any issue relevant to trial counsel's performance, the Court has already determined that Petitioner has not demonstrated prejudice under Strickland; therefore, he has not alleged facts that, if true, would entitle him to relief. Silva, 279 F.3d at 853. See supra, pp. 27-28.

In support of the second contention in Claim J, Petitioner has attached to his reply brief an affidavit by Dr. George Woods, who attests that the psychiatric autopsy is a valuable and accepted forensic technique and opines that such a procedure, if performed by Dr. Bendheim, would have supported the theory that the victim had committed suicide. (Dkt.98, Ex. C.) Petitioner's failure to develop this type of information in the state court proceedings precludes this Court from granting*955 him an evidentiary hearing on this

aspect of Claim J. The Court further observes that the information contained in the affidavit, which dates from June 2001, is at best tangentially relevant to the issue of whether counsel performed in an objectively unreasonable and prejudicial manner when he failed to persuade the trial court to appoint Dr. Bendheim for the purpose of performing a psychiatric autopsy of Mr. Grove. See supra, pp. 920-922.

Claim P: Petitioner seeks an evidentiary hearing on his claim of IAC at sentencing. (Dkt. 82 at 91.) Petitioner supports his request for a hearing, and the merits of Claim P, with the new factual material already outlined by the Court, which includes information obtained from Petitioner's relatives (Dkt. 82, Exs.4, 5), the medical records of Petitioner's father (id., Ex. 13), and affidavits filed by Drs. Lebowitz (Dkt.98, Ex. K) and Stanislaw (Dkt.111, Attach.). Petitioner asserts that he did not fail to develop this evidence in state court and that he has alleged facts that, if true, entitle him to relief. (Dkt. 82 at 91.) The Court disagrees.

Petitioner knew the factual basis for his claims at the time of the extensive PCR proceedings. He has not shown that the evidence he now presents was not available during that period. Petitioner contends, however, that any inadequacies in his effort to develop a record before the state court were not attributable to a lack of diligence on his part. Instead, Petitioner alleges that "[PCR] counsel requested time, funds, and a hearing at which to investigate, develop and present this evidence" but "were denied all of that." (Dkt. 98 at 70.) As the Court has previously recounted, PCR

counsel requested and were granted thirty-four motions to extend, resulting in a delay of nearly four years between the filing of the preliminary PCR petition and the supplement. This fact sufficiently addresses the contention that the trial court denied Petitioner's request for time to develop his claims.[36]

Petitioner does not indicate which request for funding the trial court denied and how such a denial impeded his ability to develop his claims.[37] To the contrary, the record demonstrates that the state court facilitated Petitioner's investigation and development of evidence supporting his claims. PCR counsel successfully moved for the appointment of an investigator and a mitigation specialist. (ROA-PCR 264, 309.) The investigator had been working on the case for more than two years prior to the filing of the supplemental PCR petition. While it is true that the mitigation specialist was appointed on July 6, 1995, only three months before the filing of the supplemental petition, Ms. Repp had been assigned to the case for well over a year before she moved for Ms. Wake's

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[36] Petitioner complains that "chaos" resulted from the fact that he was represented by multiple attorneys during the PCR proceedings. (Dkt. 119 at 6.) However, Ms. Repp alone had twenty-one months, during which she moved for and was granted seventeen continuances, to file a supplemental petition.

[37] The only motions denied were for contact visits between Ms. Wake and Petitioner (M.E.11/20/95) and the request for disclosure of Petitioner's DOC file (M.E.12/27/95). Although the former motion was denied, Ms. Wake indicated that she interviewed Petitioner twice. (ROA-PCR 319, Ex. 3 at 2.)

appointment in March 1995. (ROA-PCR 301-2.) Moreover, by the time Ms. Wake filed her supplemental affidavit of July 7, 1996, she had been working on Petitioner's behalf for more than a year, but she was still unable to offer more than conclusory claims regarding the existence of additional, unspecified, mitigation evidence. (ROA-PCR 342.)

The trial court denied Petitioner's claims without holding an evidentiary hearing as requested by Petitioner. (M.E.6/21/96, 7/24/96.) The Court finds, however, that the state court's refusal to hold an evidentiary hearing was attributable to Petitioner's failure to develop the factual record. See Koste, 345 F.3d at 986. A reasonable attorney, provided with the time and funding to which PCR counsel had access, would have presented affidavits and records in support of the argument that Petitioner's traumatic family background was not adequately explored by trial counsel. See Dowthitt, 230 F.3d at 757. With nothing before it but Ms. Wake's affidavits and their allusions to additional mitigating information, the trial court was not unreasonable in denying the claim without holding an evidentiary hearing.

Because Petitioner did not "undertake[] his own diligent search for evidence" in state court, Williams, 529 U.S. at 435, he is not entitled to an evidentiary hearing. Based upon the same analysis, the Court again denies Petitioner's motion to expand the record. See Holland v. Jackson, 542 U.S. at 652-53.

Claim R: Petitioner asserts that "he is entitled to an evidentiary hearing where he can further develop

the facts on the 'process' the Arizona Supreme Court used to conduct this [i.e., proportionality] review generally, and specifically in this case." (Dkt. 82 at 95.) Petitioner raised the claim of constitutionally inadequate proportionality review in his preliminary PCR petition (ROA-PCR at 13-16), but did nothing to develop the claim in state court. Moreover, as the Court noted in its Order denying discovery of documents related to this Claim (Dkt. 75 at 7) and discussed with respect to Claim R, such information is not relevant to the Court's evaluation of the supreme court's proportionality review. Petitioner is not entitled to an evidentiary hearing on this issue.

Claim AA: Petitioner raised the issue of ineffective appellate counsel in his preliminary PCR petition. (ROA-PCR at 16-17.) The claim consisted of the conclusory assertion that "Petitioner's appellate counsel failed, inter alia, to raise the claims set forth in this petition." (Id. at 16.)

As discussed above, a claim of appellate IAC requires a showing that counsel's failure to raise certain issues on appeal fell below professional norms of performance and was therefore constitutionally deficient. Petitioner did not attempt to make such a showing in state court. He did not, for example, investigate the basis of appellate counsel's decision not to raise the issues which form the basis of this claim. Petitioner's lack of diligence in state court prohibits the Court from holding an evidentiary hearing.

## CONCLUSION

The Court finds that Petitioner has failed to establish entitlement to habeas relief on any of his claims. The Court further finds that an evidentiary hearing in this matter is neither warranted nor required.

Accordingly,

**IT IS HEREBY ORDERED** that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt.27) is **DENIED WITH PREJUDICE**. The Clerk of Court shall enter judgment accordingly.

**IT IS FURTHER ORDERED** that the Clerk of Court send a courtesy copy of this Order to Noel Dessaint, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, Arizona 85007-3329.

Dated this 28th day of September, 2006

s/_____
Roslyn O. Silver
United States District Judge

# APPENDIX C

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

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| Edward Harold SCHAD, | No. CV-97-2577-PHX-ROS |
| Petitioner, | DEATH PENALTY CASE |
| v. | ORDER |
| Dora SCHRIRO, et al., | |
| Respondents. | |

Before the Court is Petitioner's Motion to Alter or Amend Judgment. (Dkt.124.) In an Order dated September 29, 2006, the Court denied Petitioner's amended habeas corpus petition. (Dkts.121, 122.) The Court simultaneously issued a Certificate of Appealability ("COA") with respect to Claims A and P. (Dkt.123.) In the present motion, Petitioner challenges the procedure by which the Court issued the COA and the Court's resolution of Claims L and AA(1).

1. Issuance of COA

Petitioner contends that the Court does not have the authority to issue a COA *sua sponte*, prior to an application being made by Petitioner. The Court disagrees.

As set forth in 28 U.S.C. § 2253(c)(1), an appeal may not be taken from a final order in a habeas proceeding "[u]nless a circuit justice or judge issues a certificate of appealability." Rule 22(b)(1) of the Federal Rules of Appellate Procedure provides:

> In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court ... the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

A COA may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner must demonstrate that "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983)).

Petitioner has cited no authority to support the proposition that the § 2253(c) or Rule 22(b) requires the district court to await a petitioner's application before issuing a COA. To the contrary, case law consistently supports the district court's authority to grant or deny a COA *sua sponte*. *See Castro v. United States*, 310 F.3d 900, 901-03 (6th Cir. 2002) (per curiam) ("a district judge may issue or deny a COA when he rules on a habeas motion"); *Deleon v. Strack*, 234 F.3d 84, 87 (2d Cir.2000) (upholding district court's decision to issue a COA *sua sponte*); *Alexander v. Johnson*, 211 F .3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny COA *sua sponte*.").

The analysis set forth in these cases persuades this Court that Petitioner's position is without merit. In *Castro*, the Sixth Circuit rejected the argument, also raised by Petitioner here, that a "premature," *sua sponte*, ruling on a COA deprives a petitioner of an opportunity to argue that he is entitled to a certificate pursuant to the standard set forth in § 2253(c) and *Barefoot*. *Id.* at 903. The court noted that Rule 22(b)(1) requires a district court to decide whether to issue a COA in situations where a petitioner has filed a notice of appeal, whether or not the petitioner also filed a motion and brief in support of a COA. *Id.* "Thus the structure of Rule 22(b) clearly contemplates the decision on issuance of COAs by both district and court of appeals judges in circumstances where the applicant for a writ of habeas corpus has not filed a motion for a COA." *Id.*

Moreover, in issuing a COA this Court had before it all of the information necessary to evaluate

the strength of each of Petitioner's allegations that his rights were violated. As the Fifth Circuit noted in *Alexander*:

> Arguably, the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before that court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.

211 F.3d at 898.

This Court agrees. Based on its experience with motions for COAs, the Court determined that additional briefing by Petitioner, who is represented by court-appointed counsel, would be unlikely to provide information not already present in the extensive pleadings filed in this case and would thus constitute an unwarranted drain on scarce judicial resources. More significantly, in issuing the COA in this case, the Court was aware of and applied the appropriate standards to assess which of Petitioner's claims was suitable for a COA.

Petitioner's motion requesting the Court to alter or amend its judgment to permit Petitioner to apply for a COA and submit briefing in favor of the application is therefore denied.

2. Reconsideration of Claims L and AA(1)

Petitioner requests that the Court alter or amend its order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. A motion under Rule 59(e) is in essence a motion for reconsideration. Motions for reconsideration are disfavored and appropriate only if the court is presented with newly discovered evidence, if there is an intervening change in controlling law, or if the court committed clear error. *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam); *see School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993). A motion for reconsideration is not a forum for the moving party to make new arguments not raised in its original briefs, *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 925-926 (9th Cir.1988), nor is it the time to ask the court to "rethink what it has already thought through," *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D.Ariz.1998) (quotation omitted).

In support of his motion, Petitioner repeats the arguments that the Court has already considered. Because the gravamen of Petitioner's arguments is simply a demand that the Court rethink decisions it has already made, the motion must be denied.

In asking the Court to reconsider its denial of Claim L, Petitioner repeats the allegation that his due process rights were violated by the Arizona Supreme Court's determination that his prior conviction for second-degree murder constituted an aggravating circumstance. In its Order denying the amended habeas petition, the Court found that Petitioner was

not entitled to relief on Claim L because (1) the Arizona Supreme Court construed its own law in finding that the prior conviction constituted an aggravating factor, and that construction was binding on this Court, *Horton v. Mayle*, 408 F.3d 570, 576 (9th Cir. 2005); (2) Petitioner was precluded from challenging the constitutionality of his prior conviction because the conviction was no longer open to direct or collateral attack, *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 403-04 (2001); and (3) Petitioner was not prejudiced by the supreme court's consideration of the prior conviction as an aggravating factor because the court determined that the pecuniary gain factor had also been proved and it alone outweighed the totality of the mitigating evidence, *Brecht v. Abrahamson*, 507 U .S. 619, 637 (1993); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Poland v. Arizona*, 476 U.S. 147, 154 (1986).

In the present motion, Petitioner restates arguments that this Court has already rejected. The arguments do not address the above-cited bases of the Court's decision, and fail to persuade the Court to alter its analysis.

Similarly, with respect to Claim AA(1), alleging ineffective assistance of appellate counsel, Petitioner repeats the arguments raised in his merits brief. Petitioner again contends that counsel's performance was deficient and prejudicial because he failed to raise as an appellate issue the trial court's exclusion of evidence regarding the victim's mental health. Petitioner asserts that such evidence, in the form of the victim's medical records and the presentation of a so-called psychiatric autopsy, would have suggested

that the seventy-four-year-old victim experienced a depression so severe that while traveling across country to visit a relative, he stopped his car by the side of the road and strangled himself to death (immediately after which Petitioner came into possession of his vehicle and wallet). According to Petitioner, evidence of the victim's mental state was admissible at trial; its erroneous exclusions prevented Petitioner from presenting a defense; and appellate counsel's failure to raise the issue constituted ineffective assistance of counsel.

This Court again finds that Petitioner was not prejudiced by counsel's failure to raise the issue because the evidence was not admissible under Arizona law. *See State v. Montijo*, 160 Ariz. 576, 774 P.2d 1366 (Ariz.App.1989). Contrary to Petitioner's arguments, it is clear that Petitioner sought to introduce expert testimony or records regarding the victim's mental health not as "general information about a character or behavioral trait" (i.e., depression and suicidal tendencies); instead, the evidence took the form of "a particularized opinion about how that trait was manifested in the case at trial" (i.e., the victim was not murdered but killed himself). *Id.* at 580, 774 P.2d at 1370. Because the evidence at issue was inadmissible, appellate counsel was not ineffective for failing to challenge its exclusion on direct appeal.

For the reasons set forth above,

IT IS HEREBY ORDERED DENYING Petitioner's Motion to Alter or Amend Judgment. (Dkt.124.)

DATED this 26th day of January, 2007.

s/_____
Roslyn O. Silver
United States District Judge

# APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

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DIVISION ONE NORBERT G. WEDEPOHL, CLERK

HON. RICHARD ANDERSON BY: S. CALKINS

CASE NO: CR-8752 DATE: June 21, 1996

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| TITLE: | COUNSEL |
|---|---|
| STATE OF ARIZONA, | R. Wayne Ford, Asst. Atty. General |
| (Plaintiff) | (For Plaintiffs) |
| vs. | |
| EDWARD H. SCHAD, JR. | Rhonda L. Repp, |
| (Defendant | (For Defendant.) |

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HEARING ON: NATURE OF PROCEEDINGS
COURT REPORTER

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On March 27, 1996, the court entered an order dismissing most of the claims in this post-conviction

relief proceeding and instructing counsel to brief the court on the three remaining claims: Claims 8.8 and 8.18 of the Preliminary Petition for Post-Conviction Relief and Claim 3 in the Supplemental statement of grounds for relief.

The court has now reviewed the supplemental pleadings filed by the defendant on May 23, 1996 and June 6, 1996, as well as the State's Supplemental Response and the defendant's Reply to the Supplemental Response. The court finds that no material issue of fact or law exists which would entitle the defendant to relief under Rule 32 of the Arizona Rules of Criminal Procedure. The petition is dismissed.

In Claim 8.8 of the Preliminary Petition counsel once again argues that Dr. Otto Bendheim should have been appointed to perform a psychological autopsy on the victim of this murder. Counsel now advances the theory that it was ineffective assistance of counsel to fail to move the court for reconsideration of its order denying this request and to fail to introduce the victim's mental health records. This court cannot imagine what would have been accomplished (after full briefing and oral argument) to move for reconsideration. This court would not have reconsidered that ruling and is not reconsidering it now. The defendant has not pointed out how introduction of the psychological records would have swayed the court's judgment because of defendant is unable to do so. There is no allegation that newly discovered evidence is now available to cause the court to reconsider what this court considers to be an imminently correct decision. Quite simply put, defense counsel is under no obligation to file frivolous

pleadings and this is precisely what the defendant is suggesting that counsel should have done. The claim has no merit.

In Claim 8.18 of the preliminary Petition the defendant complains that appellate counsel was ineffective for failing to raise some 17 issues on appeal in addition to the issues that were briefed and argued. It is obvious from the record in this case that defense counsel's decision to leave out numerous potential issues was a strategic decision. Good appellate advocacy demands that lawyers make these kinds of decisions so that there primary arguments are not lost in the forest of a shot gun approach. This mere allegation that it was some how ineffective assistance of counsel to make this particular strategic decision, with which present counsel seems to disagree, presents no showing whatsoever that the professional work of appellate counsel falls below the requisite standard of performance nor that in any way would a different approach have changed the outcome. The claim has no merit.

In issue #3(a) of the Supplemental Petition, the defendant alleges that trial counsel was ineffective for failing to locate and present to court and jury the testimony of Sharon Sprayberry, the former wife of John Ducan, who did testify at the trial. There is also an apparent issue of newly discovered evidence with respect to the testimony of Sharon Sprayberry. Certainly Mrs. Sprayberry's availability is not newly discovered; her whereabouts were known by the defense at the time of the trial. The trial court concluded twice and the Arizona Supreme Court concluded twice that Duncan was not operating as a police agent. Defendant now contends that his former

wife would offer impeachment evidence with respect to that issue. Indeed this court ruled as a matter of law that Duncan was not a police agent. The proposed testimony of Sharon Sprayberry is certainly not new-it is merely cumulative impeachment and it is, therefore, not even particularly material. Even if the testimony of Sharon Sprayberry as presented in affidavit form in this proceeding were accepted as true, this court cannot imagine how the outcome of this trial would have been changed by offering this rather limited impeachment testimony in the face of the overwhelming proof of the defendant's guilt from a variety of sources. The claim has no merit.

In the Supplemental Petition, Claim 3(b), defendant contends that counsel was ineffective for failing to uncover mitigating evidence that might exist. If the mitigation evidence then turns out to be favorable to the defendant, resentencing might be appropriate. Defendant is simply suggesting that it would be a good thing now to delve further into defendant's prior convictions and to try once again to talk to family members, etc, etc. Defendant is simply asking to go on a fishing expedition with no showing of what would be turned up that the court did not already know at sentencing time and how that might effect sentencing. The claim has not merit.

cc: Victim Witness Program

# APPENDIX E

Noel K. Dessaint Supreme Court Kathleen E. Kempley
Clerk Of The Court State of Arizona Chief Deputy Clerk
402 Arizona State Court Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone: (602) 542-8396

September 19, 1997

Re: STATE OF ARIZONA vs. EDWARD HAROLD SCHAD, JR.
Supreme Court No. CR-96-0629-PC
Yavapai County No. CR 8752

Greetings:

The following action was taken by the Supreme Court of the State of Arizona on September 16, 1997, in regard to the above-referenced cause:

**ORDERED: Motion to Amend Opposition to Petition for Review = GRANTED**

**FURTHER ORDERED: Petition for Review by the Supreme Court [on Denial of Post-Conviction Relief] = DENIED**

NOEL K. DESSAINT, CLERK

TO:

Hon. Grant Woods, Arizona Attorney General
Paul J. McMurdie, Esq., and R. Wayne Ford, Esq.
Rhonda L. Repp, Esq.
Edward Harold Schad, Jr., DOC #40496, Arizona State Prison-Florence
Hon. Richard Anderson, Judge Yavapai County Superior Court
Hon. Raymond W. Weaver, Presiding Judge, Yavapai County Superior Court
Norbert Wedepohl, Clerk, Yavapai County Superior Court

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## CONSTITUTIONAL PROVISIONS

In addition to the relevant provisions in the Warden's Petition, this case also implicates the Eighth Amendment to the United States Constitution which provides:

> Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishments inflicted.

## REASONS FOR DENYING THE WRIT

Respondent Edward Schad[1] respectfully requests this Court deny the petition for writ of certiorari. No certiorari-worthy reason exists for this Court to review the Ninth Circuit Court of Appeals majority opinion ordering a limited remand to the district court to determine the reasonableness of Schad's efforts during state postconviction proceedings to discover all the facts supporting a life sentence. The limited remand is appropriate for two reasons. First, the district court below denied Schad an evidentiary hearing on sentencing counsel's ineffectiveness based on an erroneous belief that Schad's lack of success in discovering all the mitigating evidence during the state postconviction proceedings demonstrated a lack of diligence on Schad's part. The district court failed to consider the reasonableness of counsel's efforts to develop the facts in state court as required by this Court's decision in *Williams v. Taylor*, 529 U.S. 420 (2000) in light of the fact that the state court failed to timely provide needed funds and experts to develop the facts in state court and then only denied an evidentiary hearing because

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[1] Edward Schad is one of the few Arizona inmates who was sentenced under Arizona's unconstitutional judge sentencing statute. *Ring v. Arizona*, 536 U.S. 584 (2002). Schad's case was stayed in the district court for a number of years pending this Court's decision on the retroactivity of *Ring*. *See Schriro v. Summerlin*, 542 U.S. 348 (2004). Even though Mr. Schad had consistently challenged the constitutionality of judge sentencing, even before this Court's decision in *Walton v. Arizona*, 497 US. 639 (1990)(which was reversed by *Ring*) Mr. Schad was denied resentencing on this claim because of the non-retroactivity of *Ring*.

counsel had failed to establish a causal nexus between the evidence counsel sought to develop and the crime for which Mr. Schad was sentenced to death. Cert.Pet.App. A-44. As the court below recognized, and consistent with this Court's longstanding law, a State's success in arguing against an evidentiary hearing in state postconviction proceedings does not determine the separate issue of the capital defendant's diligence in investigating and presenting evidence discovered during those proceedings supporting a claim of trial counsel's ineffectiveness. *Id.*, A-43; *Williams v. Taylor*, 529 U.S. 420, 432, 435 (2000)(prisoner diligent if he "made a reasonable attempt, in light of the information available at the time, to investigate and pursue the claims in state court"). Instead, diligence "require[s] in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

Second, assessing a defendant's diligence is an objective inquiry, requiring the court to determine whether a petitioner "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* Diligence requires petitioner "at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U.S. at 437. Schad satisfied that requirement. He alleged a colorable claim of trial counsel's ineffectiveness at Schad's life or death sentencing trial. He requested the state postconviction court grant him a hearing where he could present evidence. He also attached affidavits supporting his request for a hearing and relief. ER 292-295, 301-310, 322-327, 328-337. That is what Arizona law required, and that is just what Schad did. *State v. Watton*, 793 P.2d 80, (Ariz. 1990).

But when a federal court raises a question as to a defendant's diligence in discovering evidence, as the court of appeals below did here, a brief remand to the district court to allow that

court to undertake an inquiry in Schad's diligence, and if needed, consider additional evidence before making that determination, is not surprising or unusual. Many fact-bound determinations require additional evidence be heard to determine the merit of asserted procedural defenses. *See e.g. Roy v. Lambert*, 465 F.3d 964 (9th Cir. 2006)(hearing on facts regarding equitable tolling). That, too, is not a startling proposition, but a reasonable one, as the law had long recognized:

> Indeed, sometimes the determination whether to hold a federal evidentiary hearing on the merits of the petition requires a preliminary hearing to assess whether the petitioner is entitled to a hearing on the merits.

Federal Habeas Corpus Practice and Procedure, Randy Hertz and James Liebman ("Hertz & Liebman"), p. 500 (5th ed. 2001), Sec. 20.1(c), p. 900, n. 44, citing *Wright v. Gramley*, 125 F.3d 1038, 143-45 (7th Cir. 1997) (remanding to allow petitioner to explain failure to develop facts in state court and "convince the district court that his failure to present the facts in plenary fashion to the state court was not due to his own neglect."). "The need for evidentiary hearings extends not only to the factual issues presented by the petitioner's claims but also to those presented by the many prerequisites and exceptions to the state's procedural defenses." Hertz & Liebman, *supra*, p. 896. "[E]ither party may request a hearing on either its own or the opposing party's claims and defenses." *Id.*, n.35.

Remand of the proceedings to allow the district court to apply the proper standard in determining Schad's diligence does not conflict with *Williams, supra, Schriro v. Landrigan*, 550 U.S. 465 (2007), or 28 U.S.C. section 2254 (e) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Cert.Pet., pp. 14-15. It is consistent with both, and the Warden's[2] contrary argument overstates both what the majority circuit panel did and its implications. The Warden's

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[2] This Brief in Opposition will refer to the Petitioner, Charles Ryan, as "the Warden" to avoid confusion, given Mr. Schad was the Petitioner in all previous proceedings.

position would effectively eliminate the federal court's ability to order a hearing *sua sponte* to address a procedural defense. This would be a significant departure from current law and this Court would be ill-advised to accept such an invitation.

Moreover, the Warden has materially overstated the scope of the remand order. As explained below, the panel did not require the district court hold a hearing on both Schad's diligence and the merits. It merely stated that if necessary, the district court could do so. This suggestion was made from a policy perspective as a means of conserving scare judicial resources and nothing more.

A. SCHAD WAS DILIGENT IN STATE POSTCONVICTION PROCEEDINGS

During the state postconviction proceedings, Schad alleged specific facts supporting his constitutional claim: trial counsel was ineffective when he failed to properly investigate Schad's background, but instead relied on a presentence report prepared by the court's employee, and a mental health expert whose only information came from that report, and two visits with Schad.[3] As a result of counsel's ineffectiveness, the sole sentencer, the trial judge, concluded that Schad's childhood was "unfortunate," but that fact was not a "persuasive mitigating circumstance," and sentenced Schad to death. ("The court does not consider the defendant's unfortunate childhood a persuasive mitigating circumstance in this case. ER 187.)

[3] The Arizona district court agreed that Schad's only expert, psychiatrist Otto Bendheim, at trial "alluded to" Schad's "'deprived'" childhood, but did not opine or even "indicate" that any mental health issues resulted from that experience. Pet.Cert., App. B-82. Bendheim, who knew little about Schad, visited Schad twice at the jail twice, reviewed the presentence report the court employee had written, testimony from Schad's prior conviction in Utah, and conducted some research on the circumstances surrounding the prior conviction. Bendheim testified Schad had "a miserable childhood," "was deprived" and "unloved." R.T. 8-22-85, pp. 48, 51. He also testified that as a child Schad was "sent from pillar to foster home to foster home." *Id.* In fact, Schad never lived in foster homes.

Postconviction counsel asserted counsel was ineffective at Schad's capital sentencing trial when counsel failed to conduct the "fundamental," independent "thorough investigation" of Schad's "background" and "social history" or "research or even address the most basic issues in any mitigation investigation." Postconviction counsel asserted as well that rather than conduct the key investigation the law required he conduct, trial counsel relied on a presentence report prepared by a state court employee: the trial court's parole officer. Counsel explained that report was "seriously incomplete," "materially inadequate," contained "significant material omissions," and "provided only limited documentation" of "Schad's history of abuse" and "the possible effects it had on his emotional well being and the part in played in the offense." ER 292-295, 323-329, 333-337, 343-345, 347, 349.

Postconviction counsel also presented evidence demonstrating trial counsel's failure to investigate and "explore" "Schad's life history as a mitigating circumstance" or "request a psychological evaluation to determine … [Schad's] impairments" and "address[] Schad's abusive childhood," and the possible effects it had on his emotional well being and the part in played in the offense." That evidence included Schad's father's "regular[]" beat[ings] of him "with a belt and later with fists," beginning when Schad "was four years old," that Schad endured to "protect[] his siblings from similar treatment," not being allowed to participate in school activities or form friendships with others, and witnessing his father's repeated abuse of his mother." ER 336.

Counsel alleged that "[p]sychological evaluations can provide a foundation for mitigation," and defense counsel's failure to "request a psychological evaluation to determine" Schad's impairments "is incomprehensible." ER 294, 346. The expert explained that to

"complete [the] social history," she needed a "thorough psychological evaluation" to uncover all "the abuse" Schad "suffered," and the resulting consequences to him. ER 337. Counsel explained that circumstances further delaying the completion of the mitigation investigation included the time intensive process of "[o]btaining out-of-state records," including prison and parole records from Utah, and the Arizona's prison refusal to grant a contact visit between counsel and Schad. ER 282-295; 301-302, 323-333-337.

Counsel also explained the harm created by the state court's belated appointment of the mitigation expert whose appointment counsel had long ago requested. As a direct result of that delay, postconviction counsel had only recently discovered that the "original" motion she filed requesting appointment of a mitigation expert had been "lost in the [court's] system" for several months. ER 344. Once counsel discovered these facts, she moved the county court for an "expedited ruling" on the expert's appointment. That motion was granted two weeks later, and the mitigation expert only then finally appointed. ER 300-302, 304, 329.

Following her belated appointment by the state court on July 16, 1995, the mitigation expert initiated investigation into Schad's background, detailing her efforts to locate needed records and key witnesses, and identifying the barriers she encountered in completing this key investigation many years later. ER 64, 69, 106-110, 333-337. The expert filed affidavits describing her efforts to investigate Schad's background, the need to interview family members (all of whom resided out of state), conduct necessary research and prepare a "complete social history." ER 323-327; 333-337. On October 19, 1995, postconviction counsel supplemented the state postconviction petition with additional affidavits, including an affidavit from the recently appointed mitigation investigator. That affidavit described the obstacles the mitigation

investigator encountered in completing the investigation, including both counsel and the expert's delayed appointments.[4] Counsel explained the need for "additional time" to uncover all the evidence supporting a life sentence, including Schad's social history records, all of which were located out of state, and involved "very time-consuming" efforts, and "a very lengthy process." *Id.* Schad's "complete military records" was "an equally time consuming process." *Id.* Counsel requested "discovery," that the state court order production of Schad's prison and military records, a psychological evaluation, and a "full evidentiary hearing." ER 301-02, 304, 328-329; 343-345, 347.

The expert's affidavit included additional evidence that trial counsel failed to investigate and present at Schad's capital sentencing: Schad "was never allowed to have a relationship with his mother or his siblings. Whenever his mother would show affection, as a mother to a child, Mr. Schad's father would yell at him and at Mrs. Schad. Both were the victims of the father's abuse. []Schad was treated more like an indentured servant than a child. From the time he was nine years old, he had to pay his own way around the house. He was not allowed to participate in after school activities or to have friends…. From the time he was four years old, Mr. Schad['s] father beat him regularly with a belt and later with fists." Schad's father was "always mad at" him. ER 335. "As a young boy and teenager," "Schad was forced to work along side his father," watch his father get "drunk after work," and required "to purchase alcoholic beverages" for his father. *Id.*

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[4] Postconviction counsel was not appointed until January 31, 1994. ER 328.

The mitigation expert explained that the only psychological evaluation performed on Schad occurred in 1978,[5] and a "current" and comprehensive "evaluation" was needed. She also explained that Schad was fearful of discussing his family history, and addressed the barriers that increased his fear. She quoted Schad's statements to her that sitting "in that little cubbyhole, and trying to talk to you through that window, isn't the easiest thing for me to do, especially trying to take you into my past." Schad told her that he had "really never done it before.... let alone trust anyone with it," but he was "trying...." ER 336.

The expert's affidavit explained as well that:

> More interviews with Mr. Schad are essential. Obtaining the records as described above are crucial in properly preparing a Mitigation Report. A law library will not provide the documentation on Mr. Schad's life history. There is no ready reference from which to draw this information. Only life records provide the foundation for mitigation which is believed to exist in Mr. Schad's case.

Wake Affidavit, p. 5. (Oct. 18, 1995), ER 337.

These facts refute the Warden's contention that the panel opinion must be reversed because Schad "failed to show even minimal diligence" under *Williams v. Taylor*, 529 U.S. 420, 437 (2000), "when he did not file affidavits with the state court to support his [ineffective counsel] claim." Cert.Pet., p. 17. Schad filed affidavits detailing the investigation, its status, identified additional records that needed to be located and reviewed, and explained the time-consuming nature of discovering and collecting the needed historical and social history documents, and the obstacles encountered when the prison denied counsel's request for a contact visit with Schad. ER 333-337; 347. Schad alleged facts that entitled him to a hearing under Arizona law: sentencing counsel was ineffective when he failed to discover and present

[5]As previously stated, the psychological examination was cursory and inaccurate.

important mitigating evidence about Schad's background and social history and supported a life sentence. Cert.Pet.App. A-39; ER 292-295, 301-310, 322-327, 328-337; *State v. Watton*, 793 P.2d 80, (Ariz. 1990)(colorable claim shown where defendant's allegations, if true, might have changed the outcome."). And, Schad requested a hearing where that evidence could be further developed. Cert.Pet.App. A-39; *Williams*, *supra*. ("Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.").

The Warden responded to Schad's petition, and requested the postconviction judge deny Schad a hearing and relief for two reasons. First, the Warden contended that Schad did not identify what he "expects to find in what has to be voluminous records from two states and the military" that he sought. Schad's expectations in obtaining and reviewing Schad's biographical records were clear: to discover the key facts of Schad's background and social history: his childhood and adult experiences, including his experiences during his military service, and the background, history and experiences of his maternal and paternal parents and siblings, including Schad's father's WWII military service and experiences. Thus, just like the petitioner in *Williams*, Schad sought to "conduct an investigation that would have uncovered extensive records graphically describing [Schad's] nightmarish childhood," and Schad being "severely and repeatedly beaten by his father...." *Williams*, 529 U.S. at 395; *Sears v. Upton*, __ S.Ct __ 2010, 2010 WL 2571856, *3-5 (2010)(mitigating evidence of defendant's parents' "physically abusive relationship," cognition deficits resulting in problems with impulse control, traumatic experiences, "grandiose self-conception," and "evidence" of "magical thinking" "might well have" made a difference at sentencing); *Porter v. McCollum*, 130 S.Ct. 447, 449-451

(2009)("extensive mitigating evidence" unknown to "penalty-phase counsel" concerning the "described his abusive childhood," including his "father['s]" weekly violence, that defendant "was his father's favorite target, particularly when [he] tried to protect his mother," and impaired defendant's "ability to conform his conduct to the law and suffered from extreme mental or emotional disturbance." State court "unreasonably discounted evidence of … childhood abuse…."); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003)("counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision…because counsel had not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background.'"(internal citation omitted).

Second, Schad requested a hearing so he could present evidence demonstrating, as then Arizona law required,[5] and the Warden argued to the postconviction judge that Schad must prove: a direct link between his conduct at the time of the crime and his abusive childhood:

> With respect to Defendant's allegation of child abuse, it should be noted that before such evidence is considered mitigating, the burden is on the Defendant **to establish that it had a direct effect on his conduct** at the time that he murdered [the victim.]

ER 319 (emphasis added). To support that contention, the Warden cited seven Arizona state court cases holding exactly that: A defendant must demonstrate a causal connection between his mitigation and his conduct at the time of the crime "that was beyond his control" before his mitigation can be considered to support a sentence less than death.[7]

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[5] *See Lambright v. Schriro*, 490 F. 3d 1103, 1114 (9th Cir. 2007); *Styers v. Schrio*, 547 F.3d 1025, 1035-1036 (9th Cir. 2008); *Williams v. Ryan*, __ F.3d. ___, 2010 WL 4188304 (9th Cir. Oct. 26, 2010).

[7] The Warden cited and described the following cases to support its request that the state court deny Schad a hearing and relief:

In late March, 1996, the state trial court issued an order stating it would consider whether to grant an evidentiary hearing on Schad's postconviction claims. The court stated:

> FURTHER ORDERED that the State shall have 30 days from the receipt of this order to file a supplemental response addressing the merits of the following claims:
> Claims: Preliminary Petition for Post-Conviction Relief Claims 8.8 and 8.18: Supplement Statement of Grounds for Relief Claim 3.
> FURTHER ORDERED Defendant shall then have 15 days to respond to the merits of the State's supplemental response.
> Thereafter, this Court will take the matter under advisement and determine whether an evidentiary hearing is necessary and on what grounds.

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"*State v. Murray (Robert)*, ... 906 P.2d 542, 577 (1995)(Defendant presented evidence that he 'had problems with involuntary bowel movements while growing up' and that his father hit him with 'fists' while disciplining him; not mitigating because defendant did not prove it impacted his behavior in a way that was beyond his control.)' *State v. Murray (Roger)*, ...906 P.2d 542, 577 (Defendant presented evidence that his father hit him with fists, a belt, and a 'switch,' that defendant left home at 14 or 15, and was 'shunned' by his father after defendant's parents divorced; not mitigating because defendant failed to prove that his background 'impacted his behavior' in committing the murders). *State v. Walden*, 905 P.2d 974, 999 (1995)(Claims that father was a verbally abusive drunk convicted of public sexual indecency and sexual misconduct, that his sibling 'were often ill,' that his sister attempted suicide while in high school not relevant to mitigation because defendant failed to show that such 'had an effect or impact on his behavior that was beyond the defendant's control.' Defendant's 'claim' that his family background caused him to suffer 'low self-esteem and alcoholism' does not explain how it had anything to do with his commission of the rapes and murder). *State v. Stokely*, __ Ariz. __ 898 P.2d 454 (1995)(38-year-old defendant failed to prove that his 'chaotic and abusive childhood' 'had an effect or impact on his behavior that was beyond the defendant's control.' Not mitigating.); *State v. Bolton*__ Ariz. __, 896 P.2d 830 (1995)(Defendant's 'undisputed severe emotional and physical abuse as a child' *not* a mitigating circumstance because defendant (19 at time of murder) failed to prove that something in that background had an effect or impact on his behavior that was beyond his control. 'The remedy for child abuse is to submit to therapy, not to abuse others and then ask, in return, to be excused.'). *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994)(Unless the defendant can prove that a difficult childhood had an effect or impact on his behavior that was beyond his control, it is *not* relevant to mitigation. Defendant failed to prove that his difficult childhood rendered him unable to control his actions."). *State v. Wood*, 180 Ariz. 53, 881 P.2d 1158 (1994)(Nothing in record substantiated defendant's claim that he was "reared in a dysfunctional family," except for his father's alcoholism and the family's period moves due to military transfers. Moreover, defendant failed to demonstrate *how* his alleged poor upbringing related to the murders.")(italics in original). ER239.

The state trial court did not act on Schad's request for a hearing until June 21, 1996. In its order denying Schad a hearing and all relief, the state court concluded, just as the Warden asked it to do, that Schad's request for needed funds to investigate and a hearing to present the results of that investigation "is simply asking to go on a fishing expedition with no showing of what would be turned up that the court did not already know at sentencing time and how that might effect sentencing. The claim has not (sic) merit." App. D-4.[8] Schad moved for rehearing, stating:

> Rather than hold an evidentiary hearing on these claims at which this Court could hear and evaluate Defendant's claims, this Court has summarily dismissed the petition. It did so based upon assumptions which a full and fair hearing would contradict.
> Based upon these materials facts, which neither the State nor this Court in its summary order, have controverted, this Court should reconsider its conclusion that certain claims raised by Defendant are precluded, and that mitigation evidence and impeachment evidence recently found, which was never previously investigated, is immaterial. At the very least, it should or an evidentiary hearing regarding the newly discovered evidence.

Mot.Rehrg. pp. 1-2. Postconviction counsel explained as well:

> [Ariz.R.Crim.P.] Rule 32.6(c) permits summary disposition only if no purpose would be served by further proceedings. Such conclusion cannot be reached here while counsel continues to uncover and investigate matters which prior counsel failed to uncover.
> ...
> Counsel also stated:
>
> The Court must exercise that responsibility by providing facts that enable the Appellate Court to determine why the post-conviction Court found the facts to be as they are.

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[8] Postconviction counsel had earlier responded to the "prosecutor's" reference to the social history investigation counsel requested "as a 'fishing expedition," stating: "Investigating the social history of any capital case defendant is fundamental to mitigation. Researching Mr. Schad's history of childhood abuse is no fishing expedition. The abuse has already been documented to a limited extent." Counsel explained that "[f]urther investigation would define and place Mr. Schad within the family environment which allowed and condoned such abuse to occur and how it impacted his involvement in this office," and that the trial court's "presentence report provided only limited documentation of" "Schad's life history" and was "incomplete." ER 293-294.

> For all the above-stated reasons, it is hereby respectfully requested that this Motion for Rehearing be granted and than evidentiary hearing be conducted on the issues raised in the Defendant's Petition.

Mot.Rehrg. pp. 3-4.

Postconviction counsel filed yet another affidavit supporting a hearing on his constitutional claims. The trial court denied that motion as well. App.A-39. The Arizona Supreme Court denied Schad's petition for review of the denial of postconviction relief without comment or explanation. ER 412.

These facts support the limited remand the Court ordered below. They also disprove the Warden's contention that the state court "dismissed" Schad's ineffective counsel claim "without an evidentiary hearing" because Schad failed to file "affidavits with facts supporting the claim." Cert.Pet.App. p. 14. Schad filed affidavits detailing the information supporting relief, and supporting his request for additional time to complete the investigation that included locating and contacting Schad's relatives, and others, all who lived across the country in New York. ER 143-147. He also identified other time-consuming barriers he had encountered in conducting the investigation: the prison's refusal to permit a contact visit with Schad, and prison regulations requiring counsel obtain a court order to obtain Schad's prison, including medical, psychological and parole records in Arizona, Utah, and Wyoming. ER 334; 333-337.

The state court denied counsel's requests for contact visits with her client and disclosure of Schad's prison records. But it never addressed, much less explained, the additional mitigating evidence postconviction counsel presented: the abuse Schad suffered and witnessed as a child, and his father's explosive, terrorizing acts of violence.

The Warden's contention that Schad was not diligent because counsel filed "numerous motions for extensions of time and status conferences" fails as well. Cert.Pet., p. 14. The Warden concedes post-conviction counsel faced "various obstacles...." Cert.Pet., p. 24. The postconviction proceedings were chaotic, but that chaos was neither Schad's creation nor fault. As The Warden and the dissenting circuit appellate judge concede, over a three year period, the state postconviction judge appointed seriatim a series of counsel to represent Schad, and then granted each of those counsel's motions to withdraw. Cert.Pet., p. 23. The dissenting circuit appellate judge concedes that the first counsel the trial court appointed sought five requests for additional time before he withdrew from representation, and the second counsel the trial court appointed filed twelve motions requesting additional time before he withdrew. *Id.* The State never objected to these motions to withdraw. The trial judge appointed Schad's final postconviction counsel, Rhonda Repp, in February, 1994 Repp moved the trial judge that same month to provide Schad funds to investigate, and in March, 1994, Repp requested the judge appoint a mitigation expert. As discussed above, unknown to Repp, her last motion for needed funds was misplaced in the state court system. ER 344. That state court error delayed the expert's appointment for more than a year, until July 6, 1995. That delay, too, was not Schad's fault. Also, in appointing multiple counsel to represent Schad in his key postconviction proceedings, and then granting each counsel's motion to withdraw, the trial judge neither stated nor implied, much less found as a fact, that the counsel the judge had appointed were less than diligent in Schad's representation in those proceedings. Each order allowing counsel to withdraw was for good cause shown. The Warden has not provided any reason to believe otherwise.

Shortly after Repp's request, the trial judge reviewed Schad's "preliminary petition" and "Supplemental Petition, the State's Response and the Defendant's Reply," and made "findings with respect to" that petition. ER 146. As to some claims, the judge denied relief and "dismiss[ed]" the claims, but as to others, including Schad's claim that his sentencing counsel was ineffective, the judge ordered that claim "survive[d]" "preclusion and dismissal," provided The Warden "30 days" to file a "supplemental response addressing the merits" of that claim, and provided Schad "15 days to respond to the" State's pleading. ER 147. The judge stated he would "thereafter" "take this matter under advisement and determine whether an evidentiary hearing is necessary and on what grounds." ER 147. As discussed above, unknown to Repp, her last motion for needed funds to investigate was "misplaced" in the state court system. ER 344. That state court error delayed the expert's appointment until July 6, 1995. That delay, too, was not Schad's fault. Also, in appointing multiple counsel to represent Schad in his key postconviction proceedings, and then granting each counsel's motion to withdraw, the trial judge neither stated nor implied, much less found as a fact, that appointed counsel was less than diligent in Schad's representation in those proceedings. Each order allowing withdrawal of counsel was for good cause shown. The Warden has not provided any reason to conclude otherwise.

The Warden's contention that a hearing on diligence is not needed because the record is "very clear" on "what counsel did and did not do" to diligently investigate Schad's background is disingenuous. Pet.Cert., p. 24. The record in the light most favorable to Schad demonstrates diligence. That there is a dispute about the material facts means only that a hearing is needed. "[O]n a motion for summary judgment, the evidence presented by the non-moving party is to be

taken as true and all reasonable inferences that may be drawn therefrom are to be drawn in the non-moving party's favor." *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 660 (6th Cir. 1999). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court must evaluate each motion on its own merit and draw inferences *against* the party whose motion is being considered.

Here, the Court of Appeals merely recognized that there is a factual dispute about diligence that cannot be resolved without a hearing. On the record as it stands, Schad has established diligence.

As discussed above, postconviction counsel filed a motion requesting funds and additional time to investigate and obtain all the available evidence supporting a life sentence. Postconviction counsel's efforts to conduct that needed investigation were thwarted first when the funds motion was lost in the state court system, and then again when the trial judge later denied that motion and a hearing where Schad could present evidence to prove his diligence and entitlement to relief. ER 143-145.

But the record is clear on the reason The Warden opposed Schad's request in the district court for a hearing on sentencing counsel's ineffectiveness. Although The Warden discussed some of the barriers Schad's counsel faced in investigating Schad's background[9] its opposition to

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[9]Postconviction counsel requested time and money to complete their needed investigation of Schad's background, but, except for some funds for the mitigation expert, the judge denied those requests. The work the mitigation specialist needed to conduct required obtaining social history records and interviewing important witnesses. Schad's mother's initial reluctance and fear of talking on the phone with an unknown investigator who said she was assisting her son is

a hearing was not based on Schad's lack of diligence, but on an entirely separate argument: the postconviction court must deny Schad's ineffective counsel claim because Schad "alleged no causal nexus between Schad's childhood and his ability to control his actions when ... he murdered [the victim." Rsp.Brf.Merits, p. 64 (Az.D.Ct. Mar. 9, 2001). The Warden argued Schad "cannot demonstrate prejudice" where "[n]othing in the material [Schad presented] establishes a causal nexus between childhood and" the "murder" "years after he left home." *Id.* To support its argument, The Warden wrote:

> The Supreme Court has said that the sentencer must consider relevant mitigation, but it has never held that an abused childhood *per se*, with no causal connection to the offense, is relevant, much less sufficient to reduce the penalty. The Arizona Supreme Court has held that family background is not relevant unless the defendant establishes that it had a definite causal link to his behavior when he killed. [*State v.*] *Djerf*, 959 P.2d at ¶ 61.

*Id.* The record is equally clear that the district court below denied Schad's request for a hearing for the very same reason: Schad did not demonstrate a direct causal nexus between his mitigation and his actions at the time of the crime:

> Petitioner's age and life experience attenuates any causal connection between Petitioner's dysfunctional childhood and the 1978 murder. See *State v. Djerf*, 191 Ariz. 583, 598, 959 P.2d 1274, 1289 (1998)("Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior....").

App. B-99. That law, of course, is contrary to this Court's longstanding clearly established federal law. In *Tennard v. Dretke*, 542 U.S. 274, 289 (2004), this Court held unconstitutional the

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neither surprising nor unreasonable given that this was the first contact from anyone assisting her son in nearly fifteen years. These facts only underscore the prejudice Schad suffered when his trial counsel failed to adequately investigate Schad's background, family and evidence supporting a life sentence, and when postconviction counsel was denied the resources needed to undertake a thorough social history investigation. *Sears, supra*; *Porter v. McCollum, supra*; *Wiggins supra*.

Fifth Circuit's rule that evidence can only be relevant to mitigation if the defendant proves a causal nexus between the mitigation and the crime.. The Court explained that a scheme that requires a petitioner first establish a nexus or causal connection between his mitigating evidence supporting life and his actions at the time of the capital crime before such evidence is given full consideration and effect has "no foundation in the decisions of this Court." *Id.* Arizona's rule was identical to Fifth Circuit's rule. *Lambright, supra; Styers, supra; Williams v. Ryan, supra.*

The Court of Appeals has given the Warden the opportunity to disprove the facts as pled by petitioner, which they have failed to do, and has instructed the district court to utilize the proper standard in reviewing the facts. There is nothing extraordinary or outrageous in this reasonable approach. The Warden also faults Schad for allegedly not requesting the district court to hold a hearing on his diligence in the state court proceedings or requesting "further factual development" of the state court record to establish diligence. Cert.Pet., p. 14. The Warden misrepresents the record and for this reason alone certiorari should be denied. Schad repeatedly requested a hearing in the district court. In his preliminary habeas petition filed in the district court below, Schad requested that court **"[c]onduct an evidentiary hearing at which proof may be offered concerning the allegations of this petition**, [and] [g]rant petitioner, who is indigent, appointment of counsel and sufficient funds to secure expert testimony and evidence necessary to prove facts as alleged in this petition," [and] [g]rant petitioner leave to amend this petition after sufficient time to complete review of the record and investigation[]." ER 386 (emphasis added). Schad later filed an amended habeas petition where he requested the District Court:

> **Conduct an evidentiary hearing to resolve any factual disputes raised by the Respondents' Answer to this Petition, or by Petitioner's Response to any**

> **Affirmative Defenses raised by the Respondents…[and] Grant such further and additional relief as may be just.**

ER 222-223 (emphasis added). In its "Answer Re: Procedural Status of Claims" dated September 22, 1998, to Schad's habeas petition, The Warden stated:

> P. Petitioner's Claim of Ineffective Assistance of Counsel has been exhausted with Respect to Subclaims 1, 2 and 3….

*Id.*, p. 25. The Warden identified "Petitioner's claim":

> Petitioner contends that he was denied effective assistance of counsel at sentencing because:
> 1. Counsel failed to investigate Petitioner's background and develop available mitigating evidence.
> 2. Counsel failed to locate records and interview persons familiar with Petitioner's background.
> 3. Counsel failed to object to or correct the inaccurate information in the presentence report.
>
> ….
>
> Petitioner has exhausted available state remedies with respect to Subclaim 1. [], having fairly presented them to the state's highest court for review.

*Id.*, p. 26.

That was not all Schad did to try to obtain a hearing on his ineffective counsel claim and Respondent's defenses. In his Reply to The Warden's Response to Schad's "Motion to Require Respondents To Admit or Deny Factual Allegations in Amended Petition," Schad stated:

> Respondents' position that this Court can resolve the procedural issues of exhaustion, default, cause and prejudice, and fundamental miscarriage of justice without an understanding of the facts is untenable. This Court must be informed of which facts are agreed upon and which facts are in dispute. If respondents deny the material facts averred by petitioner, **then, an evidentiary hearing is required to resolve those facts so that this Court can make an informed decision on the procedural posture and the merits of petitioner's claims**.

*Id.*, pp. 2-3 (Ariz.D.Ct. Dec. 21, 1998)(emphasis added).

He also repeatedly argued in those proceedings that he had exercised diligence in attempting to discover all the evidence supporting a sentence less than death, and he requested the district court hold a hearing where that evidence could be presented.

The district court denied Schad a hearing, and all relief, but granted a certificate of appealability on sentencing counsel's ineffectiveness. ER 8. Necessarily included in that certificate of appealability are all procedural issues "fairly subsumed" in the certified issues. *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005)(where issue "subsumed within the COA [it is] properly before this court for consideration."), *aff'd on other grounds*, 127 S.Ct. 1070 (2007). Schad's diligence in those proceedings is fairly subsumed in that certified question.

B. A BRIEF REMAND IS APPROPRIATE HERE.

Despite the Warden's sounding of the alarm, the decision below granting a short remand to the district court to receive additional evidence on Schad's diligence does not conflict with either *Williams*, *supra*, or *Schriro*, *supra*, Pet.Cert., p. 14, on the definition of diligence, or the availability of evidentiary hearings where needed. Schad made reasonable attempts to investigate trial counsel's ineffectiveness at his capital sentencing trial. He requested resources and time, and he requested the court "[c]onduct an evidentiary hearing to resolve any factual disputes raised by Respondents' Answer to the Petition, or by Petitioner's Response to an Affirmative Defenses raised by the Respondents." Amd.HCP, ER 222-223.

The Warden contends that review of the state record alone is sufficient to determine Schad's diligence. Cert.Pet. p. 22. The record alone shows Schad's diligence. The court should

deny certiorari for this reason as well.[10] Schad repeatedly requested funds to investigate and discover all the evidence supporting relief, and a hearing where that evidence could be presented. As explained above, these proceedings were unusual in that the state court judge first appointed, and then granted motions to withdraw from a series of counsel who appeared to have done little, if anything, in their representation of Schad in the posconviction proceedings. In granting those counsel's motions to withdraw, the state court judge made no findings of any kind indicating, much less finding, that any of the counsel he had appointed were or had been negligent or failed to exercise diligence in their representation of Schad in those proceedings. But the record is clear that counsel alleged a colorable claim, supported those allegations with affidavits from a mitigation specialist, and requested a hearing to present additional evidence to prove Schad's entitlement to relief.

The Warden's reliance on the dissent's description of the state postconviction proceedings does not alter that fact. Pet.Cert., pp. 23-24. The described events provide no facts other than the dates the trial judge appointed each counsel, the number of extensions each counsel sought, whether any requests for funds were made, and the date the trial judge granted each counsel's motion to withdraw. *Id.*[11] Similarly, The Warden's contention that the state court denied Schad an evidentiary hearing based on

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[10] The court should deny certirorari where alternative grounds exist to support the judgment of the lower court. "[A]a respondent may argue to this Court any basis supported by the record for affirming the judgment." *Thigpen v. Roberts*, 468 U.S. 27, 33 (U.S. 1984)(Rehnquist, C.J., dissenting on different grounds.) Because the facts in the record do demonstrate diligence, Schad has already established his right to an evidentiary hearing because he did not "fail to develop." *Williams, supra.* If anything, the Warden has received the windfall with the Court of Appeals giving him a second bite at the apple to offer facts which would show that Schad was not diligent in state court.

[11] The Warden has never alleged or offered any facts to suggest that the Motions to Withdraw were not for good cause.

"counsel's failure to file any affidavits supporting his claim" is erroneous as well. *Id*, p. 25. As detailed above, Schad filed affidavits describing the mitigating evidence counsel was able to uncover without a hearing or additional funds to conduct the thorough investigation needed. Those facts established a colorable claim under Arizona law. Also discussed above, the state court only denied Schad a hearing after The Warden requested it do so for an unconstitutional reason: Schad did not establish a causal connection between his life-supporting evidence and his actions at the time of the crime.

Those facts also answer the dissenting judge's concern that the majority failed to consider Schad's diligence in the state court proceedings before addressing the new evidence Schad discovered once counsel were provided funds to investigate. *Id.*, p. 26. As discussed above, Schad exercised diligence in the state court: he alleged a colorable claim, supported that claim with available affidavits and requested a hearing.

The Warden's contention that the court below "awarded Schad a second chance to show his diligence" is misguided. Cert.Pet., p. 27. First, as shown above, Schad was diligent in the state court proceedings, as the facts presented here make clear. But if this Court questions that fact, the remand by the majority court below is the proper remedy. Schad has never been provided a hearing in either the state or federal courts to present evidence establishing his diligent attempts to discover all the facts supporting a life sentence, or evidence supporting a life sentence. He is entitled to both on these facts.

Finally, the Warden complains loudly and repeatedly that the court of appeals has ordered the district court to hold a hearing on the merits of the claim. The Warden completely misstates the record. The court of appeals merely suggested that the district court may chose to take

evidence on the merits of Schad's ineffectiveness claim at the same time that it hears evidence on the question of diligence. This makes sense from a policy standpoint and a judicial economy standpoint. The district court is certainly capable of taking evidence and then later ruling that it will not consider that evidence should it determine that Schad was not diligent in discovering the facts. The suggestion of a simultaneous hearing was merely that – a suggestion. The court of appeals certainly did not order the district court to do so and that is a matter to be worked out between the parties and the court on remand. It is certainly not worthy of this Court's exercise of certiorari jurisdiction.

### C. NOTHING IN THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S DECISION IN *LANDRIGAN V. SCHRIRO*. RATHER THE COURT OF APPEALS DECISION FAITHFULLY APPLIED THIS COURT'S CLEARLY ESTABLISHED FEDERAL LAW.

The opinion below does not conflict with *Landrigan*, as The Warden now contends. Cert.Pet., pp. 27-33. The district court's alternative ruling that Schad was not prejudiced by his counsel's failure to present mitigation evidence was tethered to its erroneous view[12] that Schad need establish a causal connection between the mitigation and the crime before it could be relevant to punishment. A-99. Thus, the district court clearly erred. *Landrigan* is not implicated – at all.

As discussed above, Schad presented a colorable claim in the state court—a low threshold under Arizona law. Schad met that showing when he alleged facts, that if true, entitled him to relief. *State v. Watton, supra*, (colorable claim shown where defendant's allegations, if true, ***might*** have changed the outcome.")(emphasis added). Schad also requested a hearing to

[12] It was the Warden who urged the district court to adopt this legally erroneous holding. ER 239.

further develop the evidence as state law required. But he was denied that opportunity when the state court denied his petition, request for a hearing and all relief.

Also as noted above, it was the Warden who requested the postconviction judge deny all relief, not because Schad failed to exercise diligence in the court below, but because, as it argued to the state court, Schad had not demonstrated a "direct causal connection" between his actions at the time of the crime and his mitigation evidence. ER 319 In denying Schad relief on his ineffective sentencing counsel claim, the district court below applied the same unconstitutional nexus requirement that The Warden urged. App. B-99.

> While serving his sentence for the 1968 murder he had established a record as a model prisoner and gained the trust of prison officials who recommended parole on the grounds that Petitioner had addressed his psychological issues and did not represent a threat to society. (RT 8/22/85 at 59-67.) Petitioner's age and life experience attenuates any causal connection between Petitioner's dysfunctional childhood and the 1978 murder. *See State v. Djerf*, 191 Ariz. 583,598,959 P.2d 1274, 1289 (1998) ("Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior"); *State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006) (lack of a "nexus" between the mitigating factor and the crime "may be considered in assessing the quality and strength of the mitigation evidence"). For these reasons, Petitioner was not prejudiced by counsel's failure to present additional information describing the nature of Petitioner's traumatic childhood.

App. B-99.

The dissenting judge also concluded a hearing was not needed based on the district court's "alternative" ruling that "even considering the newly developed information" supporting sentencing counsel's ineffectiveness, Schad was not entitled to relief. But the dissent failed to recognize that the alternative ruling was tethered to an unconstitutional premise.Review of the facts plainly establishes that Schad was prejudiced by his counsel's unprofessional errors. Once

Schad was appointed a Federal Public Defender and funds for records, investigation and experts were finally provided to him, a plethora of classic mitigation was uncovered.

Once Schad entered the federal district court, counsel were appointed and repeatedly requested the hearing Schad had been denied in the state court. Counsel also undertook the thorough investigation of Schad's background that the law has long required[13]As shown above, the fruits of that investigation uncovered additional key evidence supporting Schad's claim alleging sentencing counsel's ineffectiveness. Schad presented that evidence and moved the district court for an evidentiary hearing.

The new evidence radically altered the picture of Schad's family background presented in the state court presentence officer's report to the sentencing judge, and Dr. Bendheim's brief (and even erroneous) testimony. The new evidence showed not only that Schad was seriously physically abused, neglected, and ultimately, abandoned, by his parents, but it detailed the longstanding mental illness, psychosis, clinical depression and chemical addiction his parents suffered throughout Schad's life. Experts armed with the facts discovered once federal habeas counsel were appointed and obtained the funds needed to conduct the thorough investigation required explained both the "profound effect" that Schad's severely mentally ill parents had on him, but also Schad's "increased" "susceptibility for [the] developmental, psychological and debilitating mental disorders" that he suffered. ER 462-463.

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[13] The district court appointed the federal public defender's office to represent Schad. The Arizona FPD had recently started a capital habeas unit. The capital habeas unit had staff investigators and paralegals and a budget for experts – resources that the state has successfully kept from Schad in the state courts. Undersigned counsel were both employed by the FPD in Arizona at the time of appointment.

These facts show that Schad's father was a WWII war hero, but his 18-month incarceration at Stalag 17-B, the infamous POW camp in Austria, left him extraordinarily impaired and mentally ill. He was a diagnosed schizophrenic who suffered brain damage, post-traumatic stress disorder, alcoholism and psychosis. ER ER 467, 484-491, 552-563. He was "violent and unpredictable," "paranoid" and "irrational," "creating a chaotic and frightening home environment in which his illness took center stage." ER 559-560, 562. He beat his wife, Mabel, in the face and head, leaving her with "a fat lip and black eyes." ER 580-581. He was "totally irrational," turned over the dinner "table filled with food and dishes," threatened Mabel with a butcher knife," and was intermittently incarcerated in the psychiatric ward at the VA hospital. ER 780.

Mabel's attempt to escape from her violent husband and home was through prescription drugs and work-filled days. For nearly thirty years, she sought medical attention for an ailment nearly every month. She was regularly prescribed narcotics, including Darvon, Percodan, Emagrin, and Codeine, often in combination for various injuries she suffered. She was prescribed Phenobarbital for her nerves. ER 590-593. Her "significant psychological problems" and "clinically significant" "emotional and psychological detachment" left her "profound[ly] detach[ed]" from Schad and "so disengaged from" Schad and his siblings that her behavior met the clinical criteria for "severe child maltreatment." ER 474, 477. Her detachment resulted in one of Schad's siblings dying when she was less than a month old because Schad's mother did not notice that her child was ill. ER 474.

Schad's younger brother, Tom, was a Viet Nam veteran and an alcoholic at 21 years old. ER 509-513, 1074-1152. Tom suffered post-traumatic stress disorder, depression, and was anxious, suicidal and had homicidal ideation. ER 1089-1101. He felt betrayed and abandoned by his mother. Tom described his father as a "distant, angry, reclusive" alcoholic. Tom was "ready to explode" and felt desperate about her circumstances. *Id.*

The severe mental illness Schad's family members suffered had a profound effect on Schad. Mabel explained that her husband "was really hard on Ed . . and never wanted [her] to show Ed any affection." She didn't "really know why it enraged him so, but [she] was afraid to hug Ed because [she] knew that Edward might hit me if I did." ER 582. Unsurprisingly, the effects of Mabel's detachment and mental illness, and Ed Sr.'s mental illness, alcoholism, random and unpredictable violent and often, delusional behavior were profound. Schad was alienated from both his parents, and unloved. Schad attempted to protect his mother and his siblings from their father's explosives rages. But his father's mental illnesses and explosive rages left Schad beaten and battered. Schad's only escape was the military, and he joined immediately after his high school graduation.

Schad also suffered multiple cognitive impairments throughout his life. He was paranoid, anxious, manic, traumatized, suffered "severe and chronic mental illness," "bipolar affective disorder," and demonstrated "classic signs of chronic depression." ER 548. His coping mechanism again his life-long depression was a "manic state," an

"overly optimistic" state where "hopelessness and helplessness" "overwhelmed him" "by disorganizing his thoughts...." FR 548.

Had Schad's trial counsel conducted the proper and competent investigation into Schad's background, he would have discovered military, medical, psychiatric records and social history records and evidence from numerous sources that provided the true portrait of Schad's childhood, family background and the mental illness that pervaded Schad's life and actions. Classic mitigation. *Sears, supra*; *Porter v. McCollum, supra*; *Wiggins supra*.

After presenting the district court below with substantial evidence demonstrating the prejudice Schad suffered when his trial counsel failed to conduct a competent and thorough social history investigation the law required, Schad requested a hearing to present that evidence showing the consequences of his severely dysfunctional family and the physical and emotional abuse, neglect and abandonment he suffered from his mentally ill, chronically depressed, addicted and often psychotic parents. See *Michael Williams*, 529 U.S. at 437 ("Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law."). As explained above, and the majority properly found, Schad is entitled to that hearing: he exercised diligence in the state court by alleging facts, that if true, entitled him to relief, and he requested a hearing where he could present the facts supporting relief.

The Warden and the dissenting judge also rely on the district court's alternative ruling that the additional evidence Schad presented to that court did not support the need for a hearing. Cert.Pet., p. 28. The facts easily demonstrate that reliance misplaced. As detailed above, the

facts discovered from a thorough background investigation of Schad's life reveal a completely different picture and background than the bare one presented by the court's probation officer in the presentence report, and Bendheim's brief testimony. See *Sears, supra*; *Porter v. McCollum, supra*; *Wiggins supra*.

Had sentencing counsel conducted the investigation he was obligated to conduct, he also would have discovered substantial available mitigating evidence corroborating Schad's few statements to Bendheim about his childhood, and shown the severe and chronic mental illness Schad suffered, his history of abuse, neglect and abandonment by his parents, and the paranoia, anxiety, trauma and chronic depression that he developed and suffered throughout his life. But because sentencing counsel failed to properly investigate and discover the true facts and details of Schad's background, the sentencer, the trial judge, rejected the little evidence trial counsel did present as "unpersuasive." No tactical or strategic reason for sentencing counsel's failures exists, and the district court did not cite or rely on one. In fact, sentencing counsel feebly attempted to present psychological testimony and evidence of Mr. Schad's upbringing. So there is no reason to believe that he would not have presented this evidence if it had been discovered. However, because he failed to conduct the thorough investigation that he was required to, he failed to discover the evidence and thus the sentence was left with a false picture of who Schad was and is. *Porter v. McCollum*, 130 S.Ct. 447, 454 (2009)(noting that the decisionmaker at "Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurate gauge his moral culpability.... It is unreasonable to discount to irrelevance the evidence

of Porter's abusive childhood, especially when that kind of history may have a particular salience for a jury evaluating Porter's behavior in his relationship with [the victim]."). *See also Sears v. Upton*, __U.S. __, 2010 WL 2571856 (2010)("We certainly have never held that counsel's efforts to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.")

These facts also answer the Warden's contention that the majority opinion failed to analyze whether the district court abused its discretion in denying Schad a hearing. Cert.Pet., p. 31. In fact, it did. The majority concluded, and the facts demonstrate, Schad alleged a colorable claim of sentencing counsel's ineffectiveness. App.A-39 (Schad alleged "sentencing counsel was ineffective for failing to discover and present mitigating evidence regarding Schad's family background."). The majority cited the expert affidavit attached that described the abuse Schad suffered as a child, including being beaten "with a belts or fists, refusing to allow Schad's mother to show him any affection, and isolating Schad from other children." *Id.* The majority noted the "expert's recommend[ation] that a comprehensive psychological evaluation be performed," and the need to "compile a thorough profile only through further interviews with Schad and his relatives." *Id.*

The majority also concluded, as the facts demonstrate as well, that in determining Schad's diligence, the district court erred in "focusing not on the reasonableness of Schad's efforts," but on his success in discovering all the evidence

supporting life. App A-43. After reviewing the evidence Schad discovered during the federal district court proceedings, the majority concluded that had that evidence:

> been presented to the sentencing court, [it] would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating factors present in the case.

App. A-44. The new evidence "showed how Schad's childhood abuse affected his mental condition as an adult," and "was so much more powerful than the cursory discussion of Schad's childhood contained in Bendheim's testimony and presentence report," and "might well have influenced [the sentencer] to impose a more lenient sentence." *Id.* This evidence provided the key connection between the evidence presented at sentencing of Schad's "intelligence, good character, many stable friendships, and church involvement," and Grove's death:

> Without this psychological link, the crime appeared to be nothing but the act of a ruthless and cold blooded killer in the course of a robbery…

App. A-45.

The Warden's next contention—that the court below failed to evaluate the merits of Schad's ineffective sentencing counsel claim under *Bobby v. Van Hook*, 130 S.Ct. 13 (2009), *Wong v. Belmontes*, 130 S.Ct. 383 (2009), or *Porter v. McCollum*, 130 S.Ct. 447 (2009), is misplaced. Cert.Pet., p. 32. The court below properly delayed that merits review following the district court's decision on Schad's diligence. Because there has been no evidentiary hearing, the court was not in a position to rule on the merits of the claim. The court did observe that the evidence as pled appeared to establish prejudice, but left it to the district court to find the facts. A perfectly reasonable ruling. The court did not "lecture[]" the district court; it merely provided recent decisions from

this Court that properly must be considered in deciding the merits of Schad's constitutional claim.

That request was understandable. As The Warden concedes, additional evidence counsel discovered in the district court proceedings was "stronger" than that presented at Schad's capital sentencing proceedings. *Id.* And as discussed above, the district court's opinion denying Schad a hearing on that evidence because it would not have made a difference must be rejected for a separate reason. Cert.Pet., p. 32. The district court first found that "the new materials [Schad presented], particularly Dr. Sanislow, offer a more elaborate explanation for the psychological effect of Schad's childhood experiences." ER 66.

But the district court then committed the exact same constitutional error as the state courts: it concluded Schad suffered no prejudice from trial counsel's ineffectiveness because Schad's "age and life experience" "*attenuate[d] any causal connection* between his dysfunctional childhood and the 1978 murder." ER 75 (emphasis added). That erroneous application of a causal connection requirement to defeat Schad's prejudice has no place here, and is contrary to this Court's clearly established law holding just the opposite. *Tennard, supra.* And, that is why the district court erred in rejecting Schad's evidence demonstrating the prejudice he suffered from sentencing counsel's ineffectiveness, and denied Schad's constitutional claim, and a hearing. Cert.Pet., pp. 31-33.

These facts also answer the Warden's next argument: that Schad has not identified the additional evidence he would present to "alter the district court's analysis of the merits." *Id.*,

p.33. When the district court alternatively ruled that Schad's three volumes of mitigating evidence was not prejudicial, it not only erred by failing to use the proper standard for diligence as described in *Williams*, but it also used the wrong standard. The District Court ruled that Schad's evidence would not have been considered by the sentencing judge because Arizona law required that the capital defendant prove a causal nexus between the mitigation and the crime. App. B-98-99. As discussed above, in denying Schad relief, the district court concluded:

> Petitioner's age and life experience attenuates any cause connection between Petitioner's dysfunctional childhood and the 1978 murder.... For these reasons, Petitioner was not prejudiced by counsel's failure to present additional information describing the nature of Petitioner's traumatic childhood.

*Id.*, p. 99. This Court has long held application of a nexus test unconstitutional consistent with its decisions in *Tennard v. Dretke*, *supra*; *Smith v. Texas*, 543 U.S. 37, 45 (2004); *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). So, too, has the court below. *Lambright v. Schriro*, 490 F. 3d 1103, 1114 (9th Cir. 2007); *Styers v. Schrio*, 547 F.3d 1025, 1035-1036 (9th Cir. 2008); *Williams v. Ryan*, __ F.3d. ___, 2010 WL 4188304 (9th Cir. Oct. 26, 2010). But that is just what the district court applied here to deny Schad both a hearing and relief on his ineffective sentencing counsel claim.

The Warden's request that this Court grant review before allowing the district court to address Schad's evidence after applying the right standard for determining diligence because otherwise it would "sanction" "unwarranted delay," is without support. Cert.Pet., p. 35. Schad has not unnecessarily delayed these proceedings, as The Warden implicitly agrees. He has properly appealed his denial of relief. The majority opinion's brief remand of the proceedings below is well supported.

It is based on the common sense principle that a court may need to hear evidence to determine whether a petitioner failed to develop facts in the state court.

The Warden's reliance on other circuit decisions (where this Court later denied the Warden's petition for certiorari) to support an "'unspoken rule,'" Cert.Pet., p. 36, is not relevant here. The Warden's veiled and unseemly argument is to appeal to a perceived lack of respect of the Ninth Circuit Court of Appeals by this Court. The Warden appears to suggest that with a "wink and a nod" it can simply say "Ninth Circuit" and this Court will have a pavlovian response and simply reverse. This Court should not indulge such disrespect for its brethren on the Ninth Circuit. The question here is not what other panels have concluded or ruled in other, unrelated appeals. None of those cases warranted this Court's certiorari review either. The only relevant question here is whether the facts presented here support the action taken by the majority below in briefly remanding the proceedings to the district court to consider additional evidence. As we have shown, they do.

Respondent respectfully requests this Court deny the petition for writ of certiorari to allow the limited remand to the court below. That remand is supported both by the facts here, and the law, and does not conflict with any decision of the Court.

## CONCLUSION

Nothing about the Court of Appeals decision is unique or surprising. The AEDPA did not deny the authority of Article III courts to hear facts on procedural defenses in habeas cases where there is a dispute.

The district court applied the wrong standard in determining diligence and tethered its

alternative holding on the merits to an unconstitutional premise. The court of appeals corrected those errors and sent the case back with proper instructions. Certiorari should be denied.

Respectfully submitted,

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No. 10-305

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IN THE
# SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTONS,

*Petitioner,*

VS.

EDWARD HAROLD SCHAD,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

Schad does not dispute that he murdered 74-year-old Lorimer Grove on or around August 1, 1978.[1]

## REASONS FOR GRANTING THE WRIT

Schad claims that the state is unduly alarmed by the majority panel decision. (BIO at i.) However, nine judges of the Ninth Circuit agree that the majority panel decision is alarming. Judge Callahan's dissent from the denial of rehearing, joined by seven other judges, states: "I write separately [from Judge Rymer's panel dissent] to point out the gravity of the majority" departure from settled Supreme Court law, and to emphasize how it effectively eviscerates AEDPA's diligence requirement as well as the preliminary showing the Supreme Court has held a state prisoner must make to obtain an evidentiary hearing in federal court." (App. at A-3.) Judge Rymer's dissent states: "Now, with the majority's blessing Schad is making the federal court sitting in habeas an alternative forum for trying facts and issues which he made insufficient effort to pursue in state proceedings. That is precisely what *Williams*[2] says that federal courts should not become." (App. at A-56.) Judge Callahan's dissent concludes that the majority panel

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[1] Expressing disgruntlement with this Court's opinion in *Summerlin v. Schriro*, 542 U.S. 348 (2004), Schad asserts that this is one of a few remaining Arizona cases in which a judge imposed the death sentence. (BIO at 1, fn.1.) Schad is wrong; there are currently more than 50 such cases pending in the Ninth Circuit.

[2] *Williams v. Taylor*, 529 U.S. 420 (2000).

decision "represents a breathtaking departure from settled Supreme Court precedent and effectively eliminates all of the benchmarks set by AEDPA and the Court for a prisoner to obtain an evidentiary hearing in federal court." (App. at A-15.)

I. *The opinion conflicts with Williams.*

Under *Williams*, the record clearly shows a lack of diligence, because Schad did not present the state court with substantive affidavits to support his ineffective assistance claim, as required by Arizona law. Schad concedes that Arizona law requires that, to obtain an evidentiary hearing in post-conviction proceedings, a defendant must submit affidavits in support of a claim. (BIO, at 2.) As Judge Rymer stated: "Schad also asked for an evidentiary hearing in state court, which, if well-founded, might show diligence—but it doesn't here because he offered no facts and identified no witnesses in support." (App. at A-65.) The state court reasonably denied an evidentiary hearing, finding: "Defendant is simply asking to go on a fishing expedition with no showing of what would be turned up that the court did not already know at sentencing time and how that might affect sentencing." (App. D-4.)

Schad claims that he did file sufficient affidavits. (*Id.* at 6-7.) But the affidavits filed by mitigation expert Holly Wake only explained what she had done and what she further wished to do regarding possible mitigation evidence. (ER 301-02, 323-327 & 333-337; see also App. at B-83 to B-87.) It would have been easy for Schad to file substantive affidavits to support his ineffective assistance claim. Schad's

mitigation claim related to an abusive childhood. (ER 336.) However, whatever abuse Schad was subjected to was presumably known to him; thus the factual basis of his claim was known to him. To the extent allegations of abuse were not presented at sentencing, Schad could simply have filed an affidavit in post-conviction proceedings detailing any such abuse. Or one of his family members could have filed an affidavit detailing such abuse. Schad conceded to the district court that such information was "readily" available at the time of sentencing. (App. at A-64.)

Schad argues that, if his affidavits were insufficient, that was due to "obstacles." (BIO, at 14-15.) But he does not explain what "obstacle" there was to his filing an affidavit from himself or family members. Schad claims he was diligent, in view of the "obstacles" he faced. (BIO at 14-15.) He claims he could not have filed sufficient affidavits because of changes of defense counsel and court rulings on various requests for assistance. (BIO, at 6-7, 13-15.) Putting aside any work done by Schad's prior post-conviction lawyers, his last post-conviction lawyer, Rhonda Repp, had plenty of time to file substantive affidavits in support of his request for an evidentiary hearing. Schad concedes Repp was appointed in February of 1994. (BIO, at 14.) Mitigation specialist Holly Wake was appointed on July 16, 1995. Her first affidavit to the court was dated October 18, 1995. (ER 323-27.) Schad's notice of supplemental petition for post-conviction and request for an evidentiary hearing, based in relevant part on Wake's affidavit, was filed that same date. (ER 328-29.)

The trial court did not file its order denying an evidentiary hearing and relief until June 21, 1996. (App. D-1 to D-4.) Thus, Schad had plenty of time to file substantive affidavits from himself, or family members who knew of the alleged abuse, irrespective of any delays in appointment of experts or appropriate of additional funds.

Besides not finding a lack of diligence, the majority panel opinion additionally erred by remanding for an evidentiary hearing on diligence because: "Neither the state court nor the district court record, however, contains information sufficient for us to determine *whether or not* those efforts [by post-conviction counsel] were reasonable and whether Schad therefore acted diligently." (App. at A-45, emphasis added.) Schad now effectively concedes that was error by insisting that the current record is sufficient to show diligence. (BIO at 15-16.) The state argues that the record is sufficient to show a lack of diligence. (Pet. at 22.) Thus, the Ninth Circuit erred by remanding for an evidentiary hearing on diligence that neither party thinks is necessary.

Nor did either party request such a hearing. As Judge Rymer's states: "Neither is there basis for requiring an evidentiary hearing *on diligence*. Schad never asked for one." (App. at A-74.) Schad attempts to show that he did request one by citing vague requests for evidentiary development buried in various habeas pleadings, but those were not sufficient to alert the district court that he wanted a an evidentiary hearing on the issue of diligence. (BIO at 18-19.) *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.

1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Schad filed a separate motion for evidentiary hearing, which specified the issues on which he sought an evidentiary hearing. (ER 448, #82. That included a request for an evidentiary hearing on the issue of ineffectiveness assistance of counsel at sentencing, which the district court rejected, but no request for an evidentiary hearing on diligence. (ER B-125 to B-127.) Nor did Schad complain in his motion to alter or amend judgment that the district court had overlooked a request for an evidentiary hearing on diligence. Nor did Schad's briefs to the Ninth Circuit argue that the district court had erred by overlooking a request for an evidentiary hearing on diligence.

If the state court record was insufficient on the question of diligence, Schad loses, because it was his burden to show diligence, as noted by Judge Rymer's dissent. (App. at A-74.) *See Williams*, 429 U.S. at 440. In light of *Williams* and AEDPA's provisions, Schad's citation to civil cases involving burdens and presumptions on civil motions for summary judgment (BIO, at 15-16) is inapt. Schad also cites cases involving remands for evidentiary hearings on affirmative defenses, such as that the petition is barred by the statute of limitations. (BIO at 2-3.) But the burden of affirmative defenses is on the state. *See generally Day v. McDonough*, 547 U.S. 198, 208 (2006) (statute of limitations). As discussed above, the burden of showing diligence was on Schad.

The state court record in this case is more than sufficient to determine the diligence issue; it shows that Schad was not diligent because he did not file the

necessary affidavits. Even if evidentiary hearings on diligence were sometimes permissible if requested by the prisoner, to allow such hearings with a state record such as this one portends evidentiary hearings on diligence in almost every federal habeas proceeding in which the prisoner attempts to present new evidence to the federal court.

II. *The opinion conflicts with Landrigan.*

*Landrigan* requires a district court, before granting an evidentiary hearing to a state prisoner on an issue of ineffective assistance, to consider whether the prisoner has presented a colorable claim of ineffective assistance, taking into account AEDPA's deferential standards. *Schriro v. Landrigan*, 550 U.S. 465 (2007). Judge Callahan's dissent explains why the majority panel opinion conflicts with *Landrigan*. (App. A, at A-4 & A-11 to A-14.) Judge Rymer's dissent also notes the majority opinion's failure to consider the ineffective assistance claim under the deferential AEDPA standards. (App. A at A-75.)

Schad first asserts that "*Landrigan* is not implicated—at all. (BIO, at 23.) That, perhaps, is an attempt to explain why the panel majority did not do a *Landrigan* analysis in reviewing the alternative discussion of the *Strickland* issue by the district court. But, diligence aside, *Landrigan* requires a federal court to undertake that analysis before granting an evidentiary hearing. The dissent on denial of rehearing chastised the panel majority for failing to conduct a *Landrigan* analysis of the ineffective assistance claim, in view of the deferential AEDPA standards. (App. at A-12.)

Schad alternatively attempts to show that the panel majority did a *Landrigan* analysis, stating: "The majority concluded . . . that Schad alleged a colorable claim of sentencing counsel's ineffectiveness." (BIO, at 30, citing App. A, at A-39.) As pointed out by Judge Rymer's dissent, the first majority panel opinion failed to say anything at all about the district court's alternative findings regarding the ineffective assistance claim. (App. at A-75.) The district court found that counsel presented a strategically sound case in mitigation, and that the newly-presented information would not have changed the sentence. (App. at B-91 to B-100.) Finally, in the second amended opinion, the majority panel acknowledged the district court's alternative ruling, but simply dismissed it by saying: "We disagree with that ruling." (App. at A-45.)

Thus, if any *Landrigan* analysis can be discerned from the panel majority's decision, it was plainly inadequate, and certainly did not employ the deferential AEDPA standards. Rather, it just found a colorable claim because the newly-presented mitigating evidence regarding his childhood was "more powerful" than the evidence presented at sentencing." (App. at A-44.)

That is not a proper *Strickland*[3] analysis. For one thing, this Court, in reviewing an opinion from the Ninth Circuit, has rejected the "more-evidence-is-better approach" to presentation of mitigation evidence.

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984). Schad's brief in opposition does not even cite *Strickland*. (BIO, at iii-iv.)

*Wong v. Belmontes*, 130 S. Ct. 383, 389 (2009). Nor did the majority panel view the new mitigation against the aggravating circumstances, which is part of the prejudice analysis. *See Bobby v. Van Hook*, 130 S. Ct. 13, 18-19 (2009) (even if counsel's performance had been deficient, Van Hook had not proved prejudice, given the weighty aggravation). In this case, there were two aggravating circumstances, one of which was a prior murder, which is certainly weighty aggravation.

Moreover, the district court analyzed the sentencing proceedings and found that counsel was not deficient in relying on "good man" mitigation rather than conflicting "damaged man" mitigation. (App. at B-92 to B-93.) The panel majority opinion recognizes that sentencing counsel called fifteen witnesses, most of whom testified to Schad's "good reputation and behavior as an adult, and particularly regarding his good behavior while in prison." (App. at A-33.) Counsel presented a psychiatrist who testified about Schad's "miserable childhood" and mental condition. (App. at A-35.) The pre-sentence report also discussed Schad's reporting a "very stormy childhood, with his father being an alcoholic and abusing the defendant on a regular basis." (App. at A-35.) The trial court found that Schad's character and signs of rehabilitation was the most persuasive mitigating circumstances; it noted Schad's "unfortunate childhood," but found it not to be a "persuasive mitigating circumstance." (App. at A-37.) The majority panel opinion ignores that Schad was 36 years old at the time of the crime, and does not discuss whether counsel's strategy was reasonable, except for noting the "more powerful" mitigation evidence regarding Schad's childhood.

Schad attempts to cloud the issue by arguing that the state courts failed to consider Schad's childhood as mitigation, in violation of *Tennard v. Dretke*, 542 U.S. 274, 289 (2004).[4] (BIO, at 11-12, 17-18, 24, 32-33.) However, as discussed above, the sentencing court clearly *considered* the childhood mitigation evidence, but simply found that it was not a persuasive reason for imposing a life sentence. Its proper consideration of the evidence is confirmed by the fact that the panel majority addressed this issue, and specifically found no violation of *Tennard*. (App. at A-46 to A-52.)

Schad attempts to argue that the remand was justified because the district court's analysis was defective under *Tennard*, because it employed "the exact same constitutional error as the state courts. . . ." (BIO, at 32..) But, as discussed above, the three panel members found no *Tennard* violation by the state courts, and so a similar analysis by the district court could not have been a *Tennard* violation. Schad quotes the district court's finding, which was that the mitigating force of the childhood evidence was "attenuated" where there was no causal connection between the evidence and the crime. (BIO at 32, citing ER 75.)

The panel majority opinion also failed to address whether it was an abuse of discretion for the district

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[4] The Ninth Circuit has a line of jurisprudence that some Arizona trial judges failed to consider mitigation because of a causal nexus requirement, in violation of *Tennard*, which the state disputes. But that is beside the point, because the Ninth Circuit itself found no *Tennard* violation here.

court to consider the merits of the issue on the basis of an expanded record rather than holding an evidentiary hearing. This Court has endorsed the utility of "paper hearings." *Landrigan*, 550 U.S. at 474. *See also Blackledge v. Allison*, 431 U.S. 63, 81-82 (1977). Schad's brief in opposition extensively cites the new evidence he proffered to the district court. (BIO, at 25-28, 30-31.) By alternatively viewing an expanded record, the district court had sufficient evidence to deny the ineffective assistance claim on the merits, and the Ninth Circuit had a sufficient record to determine the claim on the merits. Schad does not say what additional evidence would be adduced at an evidentiary hearing.

## III. *A remand would be neither appropriate nor brief.*

Schad claims that a remand would be appropriate and brief. (BIO at 20-23.) It would be neither.

First, any remand is inappropriate, for the reasons discussed above. As Judge Callahan noted, this case has already consumed "thirty years of litigation." (App. at A-4.) Both parties agree the current record is sufficient to decide the diligence issue. Judge Callahan's dissent concludes that the "seemingly innocuous decision to remand" is actually a substantial revision of AEDPA and "governing Supreme Court authority." (App. at A-14.) There was no basis for the majority panel to even suggest that the district court could hold a hearing on the merits of the issue before deciding the diligence issue.

Second, there is no basis for Schad's assertion that a remand will be "brief." Judge Callahan and her seven colleagues predict that: "The majority's order remanding for 'further proceedings' and a possible evidentiary hearing ensures that the litigation will continue *for several years more* despite every indication that it should end." (App. at A-5, emphasis added.) That prediction is supported by the time line of two Arizona cases that the Ninth Circuit remanded to the district court for evidentiary hearings on the issue of ineffective assistance at sentencing. In *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998), the Ninth Circuit remanded to the district court in 1998 and did not consider the district court's ruling until 2008. *See Correll v. Ryan,* 539 F.3d 938 (9th Cir. 2008) (granting writ as to sentencing, after rejecting district court's findings and conclusions regarding ineffective assistance claim, following an evidentiary hearing). In *Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001), the Ninth Circuit remanded to the district court for an evidentiary hearing in 2001; and did not consider the district court's subsequent ruling until 2007. *See Lambright v. Schriro*, 490 F.3d 1103, 1128 (9th Cir. 2007) (granting writ on sentencing, after rejecting district court's findings and conclusions regarding ineffective assistance at sentencing, following an evidentiary hearing).

Schad asserts that the panel majority only "suggests" simultaneous hearings on diligence and the substantive issue. But the district court is unlikely to ignore the appellate court's "suggestion."

Finally, this Court should consider not only the delay in this particular case, but the effect that the published majority opinion will have on other habeas cases. As Judge Callahan writes: "the majority's revision of the law is likely to engender confusion among the district courts as well as disparate outcomes in their rulings on state prisoners' requests for an evidentiary hearing." (App. at A-10.)

## CONCLUSION

This Court should grant the petition for writ of certiorari, reverse that part of the Ninth Circuit opinion remanding to the district court for additional proceedings, and affirm the judgment of the district court denying habeas relief, as set forth in Judge Rymer's dissent.

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